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NOTES

VIEWING THE CONSTITUTIONALITY OF THE ACCESS ACT THROUGH THE LENS OF FEDERALISM

INTRODUCTION

In the early morning of September 29, 1994, six individuals began their mission. In clandestine fashion, three of the men wedged a Plymouth automobile into the front entranceway of a clinic and welded themselves to the car. One of the men placed his lower body on the ground through a hole cut in the car's floorboard.¹ Meanwhile, the other three men blockaded the rear door of the building with a second automobile and similarly welded themselves to it.² One of them sat in the driver's seat and was "restrained by a welded steel device confining his head in a steel harness, which was located around his head by placing a carjack inside a hollow steel pipe."³ The second one "was in a hole cut in the passenger-side floorboard, with his lower body resting on the pavement and his upper body confined inside an electric clothes dryer. His head was restrained in a locked harness secured around his throat."⁴ Finally, the third man "was in the right rear passenger seat with his arm encased and handcuffed inside a steel pipe."⁵

This striking event transpired at the entrance of the Wisconsin Women's Health Care Center in Milwaukee, Wisconsin. The six men were pro-life crusaders who, following in the tradition of civil rights demonstrators three decades earlier,⁶ resorted to nonviolent

1. *See* United States v. Wilson, 73 F.3d 675, 677 (7th Cir. 1995).

2. *See id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Some pro-life demonstrators in the 1990s draw a parallel between their cause and

civil disobedience as a means of protesting what they believed was the subjugation of higher principles and moral imperatives by a morally bankrupt social and legal hierarchy. Their actions had some impact. It took several hours for the Milwaukee fire department to extricate the men using "hydraulic equipment, blow torches, saws, and pry bars in the process."⁷ However, while state and local officials could have adequately dealt with the disruption at the clinic, the six men were not indicted under state law. Instead, federal authorities indicted them under the Freedom of Access to Clinic Entrances Act of 1994 ("Access Act").⁸ The Access Act is a federal statute enacted pursuant to the Commerce Clause⁹ in response to the increasingly confrontational tactics employed by anti-abortion demonstrators—including a few cases of extreme violence.¹⁰

Legislation like the Access Act has been subject to growing criticism. Critics argue that such legislation intrudes on the authority of the states over their criminal jurisdictions under the guise of the Commerce Clause.¹¹ Indeed, one judge described the Access Act as "federal overkill."¹² However, until very recently the seemingly interminable advance toward federalizing crime, much of it local, has been criticized primarily in prudential rather than constitutional terms.¹³ Fortunately, however, the Supreme Court's 1995

the actions of civil rights demonstrators in the 1960s. See, e.g., Steven Manning, *Civil Warriors?*, SCHOLASTIC UPDATE, Apr. 20, 1990, at 17, available in LEXIS, NEXIS library, ARCNWS file.

7. *Wilson*, 73 F.3d at 677.

8. 18 U.S.C. § 248 (1994) (providing civil and criminal penalties for some types of interference with access to reproductive health service providers and places of worship). The Access Act has also been referred to by the acronym FACE.

9. U.S. CONST. art. I, § 8, cl. 3.

10. See *infra* note 30 and accompanying text.

11. There is no difficulty if federal criminal law displaces state law that is already addressing a particular problem. The Supreme Court has "rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981) (citations omitted); see also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1496 (1994) (arguing that while the Constitution sets up separate spheres for the federal and state governments, it also provided for concurrent spheres of authority "where state law would govern unless and until displaced by positive federal enactment"). The dilemma, instead, is whether the Commerce Clause has been interpreted so broadly that it intrudes on spheres that were originally intended to be the exclusive domain of the states. That is the focus of this Note.

12. See *Wilson*, 73 F.3d at 698 (Coffey, J., dissenting).

13. See, e.g., Kathleen F. Brickey, *Criminal Mischief: The Federalization of American*

decision in *United States v. Lopez*¹⁴ has revitalized the debate over the proper role of the federal government in our constitutional scheme, and has spawned much commentary in the process.¹⁵ In this climate, the federal criminalization of obstructive anti-abortion activities under the Access Act is an excellent area of law to debate federalism. While this area involves federal constitutional concerns (i.e. abortion rights), it entails the regulation of activities that are generally wholly local in nature and, for the most part, have an attenuated connection to "Commerce . . . among the several States."¹⁶

This Note joins the debate over what the proper scope of the commerce power should be in a system of enumerated powers. It analyzes the judicial attempts at squaring the Access Act with the Constitution and addresses the constitutionality of the Access Act under a new method of analysis of the Commerce Clause. Part I begins with a historical background of the events leading to the passage of the Access Act. Then, in order to establish a framework for a departure from traditional Commerce Clause jurisprudence, Part I traces the Supreme Court's Commerce Clause jurisprudence since its inception in the early nineteenth century, its radical transformation during the New Deal, and finally its reassessment by the Court in *Lopez*. Part II then explores the competing views of federalism arising out of *Lopez* and articulates a federalism framework under which to analyze the several cases that have addressed the

Criminal Law, 46 HASTINGS L.J. 1135, 1165-74 (1995) (arguing that involving federal courts in criminal matters is often a waste of resources).

14. 115 S. Ct. 1624 (1995). The Court in *Lopez* struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2)(A) (1995). *See id.* at 1626. It was the first time in nearly six decades that a federal statute has fallen on Commerce Clause grounds. *See id.* at 1633. *See infra* Part I, Section B, subsection 6.

15. For example, Professor Ackerman described *Lopez* as "one of the opening cannonades in the coming constitutional revolution." Stuart Taylor, Jr., *Judging With Pinpoint Accuracy*, THE RECORDER (San Francisco), May 8, 1995, at 10, available in LEXIS, NEXIS, LEGNEWS library. On the other hand, other commentators have argued that *Lopez* does not represent a rejuvenated federalism. *See, e.g.*, Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839 (1996) (arguing that *Lopez* is more significant for its symbolic value than as a revisitation of Commerce Clause jurisprudence); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 661 (1996) (arguing that those perceiving *Lopez* as a hopeful sign for federalism "are looking for the future in the wrong place"). *But see* Melvyn R. Durchslag, *Will the Real Alfonso Lopez Please Stand Up: A Reply to Professor Nagel*, 46 CASE W. RES. L. REV. 671, 672 (1996) ("[m]y sense is that Chief Justice Rehnquist has bigger fish to fry than 18 U.S.C. § 922(q).").

16. U.S. CONST. art. I, § 8, cl. 3.

constitutionality of the Access Act. Finally, Part III articulates a standard to guide post-*Lopez* courts construing the Commerce Clause. It proposes a commercial activities test to establish substantive limits to what is now a virtually unlimited commerce power. Under this Note's proposal, certain spheres of activity would be outside the scope of the commerce power, notwithstanding their effects on interstate commerce. Within one of these spheres is the activity regulated by the Access Act.

I. BACKGROUND ON THE ACCESS ACT AND THE EVOLUTION OF THE SUPREME COURT'S COMMERCE CLAUSE JURISPRUDENCE

A. *Freedom of Access to Clinic Entrances Act of 1994*

The Access Act of 1994 was enacted to safeguard the freedom of access to "reproductive health"¹⁷ clinics in the face of a rising level of force, threat of force, and physical obstruction used by anti-abortion demonstrators to intimidate and prevent women from seeking an abortion.¹⁸ Specifically, the Access Act targets abortion protestors who employ blockages, assaults, and other confrontational tactics, including violence and threats.¹⁹ The Act provides criminal penalties²⁰ and civil remedies²¹ against any individual who:

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of per-

17. Reproductive health services are defined as "services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling, or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of pregnancy." 18 U.S.C. § 248(e)(5).

18. See H.R. REP. No. 103-306, at 3 (1993), reprinted in 1994 U.S.C.C.A.N. 699, 700.

19. See H.R. REP. No. 103-306, at 3.

20. See 18 U.S.C. § 248(b). The Access Act provides a term of less than one year for first offenses (plus fines), a prison term of not more than three years for second or subsequent offenses (plus fines). However, for nonviolent physical obstruction the Access Act provides a prison term of less than six months for a first offense (fines no more than \$10,000), and a prison term of less than 18 months for subsequent offenses (\$25,000 fine). See 18 U.S.C. § 248(b).

21. See 18 U.S.C. § 248(c). For nonviolent physical obstruction, the Access Act provides a \$10,000 fine for first offenses and a \$15,000 fine for subsequent offenses; a \$15,000 fine for other first-time offenses and a \$25,000 for other subsequent offenses. See 18 U.S.C. § 248(c).

sons from, obtaining or providing reproductive health services;

. . . .

or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services. . . .²²

The legislative history of the Access Act details lengthy findings set forth by Congress to justify the statute, and offers evidence of the effect that anti-abortion demonstration violence has on interstate commerce.²³ The findings describe "an interstate campaign of violence and obstruction aimed at closing the facilities or physically blocking ingress to them, and intimidating those seeking to obtain or provide abortion-related services."²⁴ Moreover, the findings state that "nationwide campaign of anti-abortion blockades, invasions, vandalism and outright violence" interferes with women's access to abortion services and that federal regulation is necessary to ameliorate the "already severe shortage" of abortion providers in the country.²⁵ Congress found, for example, that from 1977 to April, 1993, there had been more than 1,000 reports of acts of violence against abortion providers—including at least 36 bombings, 81 arsons, 137 death threats, 84 assaults, 2 kidnappings, 327 clinic invasions, and 1 murder.²⁶ According to Congress, this "interstate campaign of violence" does more than merely handicap abortion providers and injure patients. It also overwhelms state and

22. 18 U.S.C. § 248(a). The Access Act has a potentially broad reach. As written, it is not limited to violent conduct in the vicinity of abortion clinics but reaches back to conduct completely removed from a clinic's location. Thus, an individual who threatened the use of force against a woman in her home because she obtained an abortion could be subject to penalties. See Laurence Tribe, *The Constitutionality of the Freedom of Access to Clinic Entrances Act of 1993*, 1 VA. J. SOC. POL'Y & L. 291, 294 (1994) (arguing in testimony that patients and doctors who are threatened at their home could be subject to the Access Act, but that this provision of the Access Act is still constitutionally valid under the Commerce Clause).

23. Congress explicitly stated that it was acting pursuant to its affirmative power to enact legislation under Article I, section 8 of the Constitution. See 18 U.S.C. § 248(b). The Access Act provides that its purpose is "to protect and promote the public safety and health and activities affecting interstate commerce by establishing [f]ederal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services." § 248.

24. S. 636, 103d Cong. § 2(a)(1) (1993).

25. S. REP. NO. 103-117, at 3 (1993).

26. See S. REP. NO. 103-117, at 3.

local law enforcement's ability to deal with it.²⁷ To compound matters, some local law enforcement agencies have not only been unable but sometimes unwilling to protect abortion providers and patients from such violence.²⁸

The passage of the Access Act was influenced by additional factors. While this was not the first time that Congress had considered legislation to criminalize obstructive anti-abortion activities,²⁹ congressional action on the Access Act was likely prompted by increasing publicity of the confrontational tactics employed by abortion clinic protestors, including the highly publicized murder of an abortion doctor in Pensacola, Florida.³⁰ Another factor was the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*³¹ which held that the conspiracy section of the Ku Klux Klan Act³² was inapplicable to anti-abortion activities.³³ As a result, federal relief was effectively unavailable to restrain anti-abortion violence and blockades.

Opponents of the Access Act claimed that state trespass and obstruction statutes had already punished thousands of anti-abortion demonstrators³⁴ and that the Access Act would unduly intrude on

27. See S. 636 § 2(a)(5).

28. See S. REP. NO. 103-117, at 19; H.R. REP. NO. 103-306, at 10.

29. In 1991, for example, United States Representative Meldon E. Levine (D-Cal.) proposed an even broader bill, H.R. 1703, 102d Cong. (1991), designed to make felonious any interference with the free access to abortion clinics.

30. On March 10, 1993, Michael F. Griffin shot and killed Dr. David Gunn outside the Pensacola Women's Medical Services Clinic, operated by Gunn. See *Clinic Doctor Killed During Abortion Protest*, ST. PETERSBURG TIMES, Mar. 11, 1993, at 1A. This was the first reported slaying in the fight over abortion. See *id.*

31. 506 U.S. 263 (1993).

32. 42 U.S.C. § 1985(3) (1994).

33. See H.R. CONF. REP. NO. 103-488, at 7 (1994), reprinted in 1994 U.S.C.C.A.N. 699, 724-25. Laurence Tribe commented on this during testimony on the Senate's version of the Access Act:

In the wake of *Bray*, clinics and women must now largely rely on state courts to issue injunctions and on local police to provide enforcement. But state and local authorities, which are properly sensitive to the rights of peaceful protest as well as to the rights of women seeking abortions, have at times been caught in the middle and have not always provided adequate protection for the rights of clinic patients and personnel, much as they might have wished to do so.

Tribe, *supra* note 22, at 307.

34. See H.R. REP. NO. 103-306, at 21-22 (1993), reprinted in 1994 U.S.C.C.A.N. 690, 717 (dissenting views of Hon. F. James Sensenbrenner, Jr.; Carlos F. Moorhead; Henry J. Hyde; Bill McCollum; Howard Coble; Lamar S. Smith; Elton Gallegly; and Robert W. Goodlatte). "Criminal trespass, criminal contempt, disorderly conduct, resisting arrest, and unlawful assembly are examples of criminal statutes" used to punish anti-abortion activities. H.R. REP. NO. 103-306 at 22, reprinted in 1994 U.S.C.C.A.N. 690, 717.

the authority of states over their criminal jurisdictions.³⁵ Nevertheless, Congress passed the Act³⁶ and President Clinton signed it into law on May 26, 1994.³⁷ Ordinarily, the Access Act would represent yet another contribution to the massive collection of federal law comprising a national police power,³⁸ much of which increasingly deals with local activities.³⁹ The *Lopez* decision, however, has provided legal ammunition to upset a whole body of federal regulation under the Commerce Clause, particularly those regulations touching upon local matters. Before *Lopez*, it was not unrealistic to assume the commerce power had grown into a virtually unlimited federal power under the Supreme Court's jurisprudence. The next section thus carefully traces the evolution of Commerce Clause jurisprudence so as to analyze the potentially far-reaching implications of *Lopez*.

B. Commerce Clause History—Determining the Limits of an Enumerated Power

1. From Marshall to The New Deal

The Commerce Clause grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁴⁰ Our understanding of this

35. See *Clinic Blockades: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 124 (1992) ("Trespass on private property is a wholly intrastate activity (as exemplified by the trespass regulations of the fifty states). Congress lacks the constitutional authority to enact such laws.").

36. The final version of the bill passed in the House on May 5, 1994 by a vote of 241 to 174 and in the Senate on May 12 by a vote of 69 to 30. FACTS ON FILE (1994), available in LEXIS, NEXIS Library, Facts on File.

37. See Michael Kranish, *Ban on Abortion Clinic Strife Signed*, BOSTON GLOBE, May 27, 1994, at 3. The children of slain abortion clinic doctor Dr. David Gunn joined President Clinton at the White House signing ceremony. See *id.*

38. Over 3,000 federal crimes are already on the books. See W. John Moore, *The High Price of Good Intentions*, NAT'L L.J., May 8, 1993, at 1140. By contrast, 17 crimes made up the entire corpus of federal criminal law in 1790. See DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS—THE DEVELOPMENT OF FEDERAL COMMON LAW, 1801-29, 7 (1985).

The Constitution explicitly authorizes Congress to punish counterfeiting, piracy on the high seas, crimes committed on federal property, and treason. See U.S. CONST. art. I § 8, cl. 6, 10, 17; art. III, § 3, cl. 2.

39. See generally Brickey, *supra* note 15 (noting several federal laws operating at the local level). The Access Act is a dichotomous example in that it exercises jurisdiction over activities, which arguably are entirely intrastate, but does so to protect federal constitutional rights.

40. U.S. CONST. art. I, § 8, cl. 3.

grant of power must be informed by basic principles of constitutionalism. It is axiomatic that Congress may only exercise those powers that are enumerated in the Constitution. It would be useless, then, to specifically define Congress' sphere of authority if its authority was unlimited.⁴¹ Additionally, Article I contains eighteen different clauses, and this "checklist structure necessarily implies a limitation on congressional authority."⁴² At a minimum, the Tenth Amendment confirms a system of limited national powers.⁴³ It speaks directly to the notion of enumerated powers by stating that those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁴⁴ Thus, the commerce power, as is true of all other powers that the Constitution grants to Congress, may only extend its reach to those spheres within its ambit.⁴⁵

This reach is given definition by the Necessary and Proper Clause, which gives Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officers thereof."⁴⁶ Chief Justice John Marshall, in *McCulloch v. Maryland*,⁴⁷ set forth the authoritative interpretation of the words "necessary and proper." He found that the phrase confers on

41. Indeed, in Federalist No. 45, James Madison argued that the powers of the national government are "few and defined." Conversely, the reserved powers of the states are "numerous and indefinite" and "will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties . . . and prosperity of the State." THE FEDERALIST NO. 45, at 236 (James Madison).

42. Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 13 (1987).

43. See Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L.Q. 901, 903 (1987). It was clear that a stronger national government was needed to compensate for the weaknesses of the Articles of Confederation. The difficulty arose from how best to achieve an effective national government to promote a national economy while also protecting states' rights. Cirillo and Eisenhofer discuss how the delegates at the Constitutional Convention debated the wisdom of an enumerated powers approach versus an indefinite power approach to the federal government and decided on the former. See *id.* at 905.

44. U.S. CONST. amend. X.

45. This seems to state the obvious, since it is uncontroverted that congressional power was not unlimited, and that the instrument of judicial review would police the limits. See Kramer, *supra* note 11, at 1495.

46. U.S. CONST. art. I, § 8, cl. 18.

47. 17 U.S. (4 Wheat.) 316 (1819)

Congress certain necessarily implied powers to effectuate those powers expressly granted.⁴⁸ While he gave a broad reading to "necessary and proper" so that the national government would have the wherewithal to meaningfully effectuate its enumerated powers, Chief Justice Marshall also affirmed the judicial department's duty to police the limits of congressional authority. He contended that "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would be the painful duty of this tribunal . . . to say that such an act was not the law of the land."⁴⁹

The first important construction of the Commerce Clause, *Gibbons v. Ogden*,⁵⁰ was decided against these fundamental constitutional principles. In *Gibbons*, the Court considered whether a 1793 federal statute that licensed ships in "coasting trade" had preempted a New York statute granting a 30-year monopoly to Robert Livingston and Robert Fulton to operate steamboats between New York and New Jersey.⁵¹ In ruling that the federal law had preempted the New York statute, Chief Justice Marshall broadly defined commerce as not only buying and selling, but "every species of commercial intercourse,"⁵² and that the power to regulate commerce among the states "cannot stop at the external boundary line of each State, but may be introduced into the interior."⁵³ However, merged with the "comprehensive" nature of the word "among" was, as Marshall argued, the notion that "it may very properly be restricted to that commerce which concerns more States than one."⁵⁴ Thus, the words "commerce among the States" are not intended to "comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or be-

48. See *id.* at 401-25. The need for implied powers to effectuate expressly defined powers was especially evident following the experience under the Articles of Confederation. Chief Justice Marshall suggested that the exclusion of a clause prohibiting implied powers, as was found in the Articles, had been purposely omitted from the Constitution to avoid the "embarrassments" that would result from its inclusion. See *id.* at 406-07.

49. *Id.* at 423. Ultimately, the issue devolves back to the same problem that Chief Justice Marshall faced in *McCulloch*. It is universally acknowledged that Congress is limited to the powers granted to it, yet "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Id.* at 405.

50. 22 U.S. (9 Wheat.) 1 (1824).

51. See *id.* at 190-91, 213-17.

52. *Id.* at 193.

53. *Id.* at 193-94.

54. *Id.*

tween different parts of the same State, and which does not extend or affect other States.”⁵⁵

Chief Justice Marshall’s opinion in *Gibbons* is well-known for the expansive reading he gave to the Commerce Clause and his determination that the powers under the clause are “plenary” in nature.⁵⁶ Indeed, he said the commerce power, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution.”⁵⁷ Yet intimately joined to the concept of a plenary power under the Commerce Clause was also the principle that it was, concurrently, “limited to specified objects.”⁵⁸ Chief Justice Marshall saw the merger of a plenary power with the limitation of this power to what is within its sphere as not only consistent but necessary under the constitutional framework of enumerated powers. “The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.”⁵⁹ While broadly construing Congress’ power under the Commerce Clause, the Chief Justice was simultaneously careful to clarify that the “completely internal commerce of a State” was properly “reserved for the State itself.”⁶⁰ Thus, ultimately, Chief Justice Marshall in *Gibbons* defined commerce power as plenary, but plenary within its own sphere.⁶¹

2. Post-*Gibbons*—The Dual Nature of the Commerce Clause

Following *Gibbons*, the Court did not have another opportunity to comment further on the affirmative reach of Congress’ commerce power until the late nineteenth century. However, the Court did explore the other aspect of *Gibbons*—the negative side of the Commerce Clause as a restraint on state authority in the absence of

55. See *Gibbons*, 22 U.S. (9 Wheat.) at 193-94.

56. See *id.* at 197.

57. *Id.* at 196.

58. *Id.* at 197.

59. *Id.* at 195.

60. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

61. Chief Justice Marshall made it clear that the federal government would not have authority over every sphere belonging to the states. “In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

the federal exercise of power. *Gibbons* is universally cited as the starting point for all discussions on the reach of congressional power under the Commerce Clause. However, as Professor Epstein observes, "[i]n one sense *Gibbons*, for all its importance, is an odd place from which to begin [discussing the commerce power], because the case itself as much concerned the limitation of state power as it did the extent of congressional power under the coastal trading statute."⁶² It was this negative, or dormant, side of the Commerce Clause that restrained state legislation when that legislation burdened or discriminated against interstate commerce, even in the absence of congressional action on the matter.⁶³ Although the Access Act deals with the affirmative side of the Commerce Clause, "[t]he modern generation of negative commerce clause cases is instructive because it proves that it is possible, and sensible, to articulate an enduring conception of interstate commerce—just as Chief Justice Marshall had insisted."⁶⁴

3. Pre-New Deal

The affirmative side of the Commerce Clause again became relevant in the late nineteenth century when Congress began exerting its regulatory powers—first in 1887, with the enactment of the Interstate Commerce Act ("ICA"),⁶⁵ and again in 1890, with the enactment of the Sherman Antitrust Act.⁶⁶ During the pre-New Deal years, the Court struggled to distinguish local commerce from national commerce—a distinction known as "dual federalism."⁶⁷

62. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1408 (1987).

63. See *Veazie v. Moor*, 55 U.S. 568, 573 (1852) (upholding a state-created steamboat monopoly because it regulated "transactions wholly internal, between citizens of the same community"); *Kidd v. Pearson*, 128 U.S. 1, 24 (1888) (upholding a state regulation prohibiting the manufacturing of intoxicating liquors because "manufacturing" was a matter reserved for local control); see also *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995) (noting that under this line of cases, certain activities such as "production," "manufacturing," and "mining" were beyond congressional reach under the commerce power because they properly fall within the province of the states).

64. Epstein, *supra* note 62, at 1410. Justices Kennedy and O'Connor also discussed the dormant Commerce Clause in their concurring opinion in *Lopez*. They noted that "in contrast to the prevailing skepticism that surrounds our ability to give meaning to the explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause." *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring). In the same paragraph, the justices stated their "duty to recognize meaningful limits on the commerce power of Congress." *Id.*

65. Ch. 104, 24 Stat. 379 (1887) (codified as amended at 49 U.S.C. §§ 10101-11917 (1994)).

66. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-8 (1994)).

67. See *Cirillo & Eisenhofer*, *supra* note 43, at 909-12. "Dual Federalism" has been

When the Court reviewed the freshly exercised affirmative side of the Commerce Clause in the late nineteenth century, it imported the same approach that it had adopted under its negative Commerce Clause cases. As in the earlier negative Commerce Clause cases, certain activities such as "manufacturing" were found to be beyond congressional reach.⁶⁸

In *United States v. E.C. Knight*,⁶⁹ the Court held that the Sherman Antitrust Act could not constitutionally be applied to a merger spearheaded by American Sugar Refining Company, a sugar refinery that had merged with four other corporations that manufactured refined sugar.⁷⁰ The Act attempted to regulate manufacturing, but the Court established that "manufacturing" does not equate with "commerce."⁷¹ It argued that "[C]ommerce succeeds to manufacture, and is not a part of it."⁷² The Court also added that the merger "bore no direct relation to commerce between the States or with foreign nations."⁷³

The Court in *E.C. Knight* was struggling to define those spheres of activity that properly belong to the states and those spheres of activity that belong within Congress' jurisdiction. The Court saw it as "vital" that the commerce power was defined independently of the police power. While the former furnished "the strongest bond of union," the latter is "essential to the preservation of the autonomy of the States as required by our dual form of government."⁷⁴ What the Court's principle signified, of course, was that certain activities, even though they may exert an influence on interstate commerce, would nonetheless be outside the scope of congressional authority.⁷⁵

defined as follows:

1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4. The relation of the two centers with each other is one of tension rather than collaboration.

Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

68. See *Lopez*, 115 S. Ct. at 1627.

69. 156 U.S. 1 (1894).

70. See *id.* at 9.

71. See *id.* at 12.

72. *Id.*

73. *Id.* at 17.

74. *E.C. Knight*, 156 U.S. at 13.

75. Such a principle is indeed consistent with the Framers' conception of the Commerce Clause. Justice Thomas explained that "[t]he Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would

Not surprisingly, the Court's inquiry into the subject matter in *E.C. Knight* was analytically similar to Chief Justice Marshall's inquiry in *Gibbons*. In that case, Marshall considered whether navigation fell within congressional reach under the Commerce Clause—he found it did. Conversely, however, Marshall also acknowledged that there is a point when certain activities, though they eventually may culminate in interstate commerce, may not yet have reached that point. Specifically, Marshall had inspection laws in mind—the object of which “is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or it may be, for domestic use”—and he found that such laws “act upon the subject *before* it becomes an article of . . . commerce among the States, and prepare it for that purpose.”⁷⁶

As late as 1936, the Court adhered to the distinction between commerce and purely local activity, with the latter deemed to be outside the scope of the Commerce Clause.⁷⁷ However, this was not the Court's exclusive approach to the Commerce Clause. In cases dealing with the instrumentalities of commerce the Court permitted Congress, in such cases as *Houston East & West Texas Railway Co. v. United States*⁷⁸ (the “Shreveport Rate” case), to regulate local activities when such activities bear such a “close and substantial relation” to interstate commerce that their regulation is essential to the effective regulation of commerce.⁷⁹

remain outside the reach of the federal Government. Such affairs would continue to be under the exclusive control of the states.” *Lopez*, 115 S. Ct. at 1645 (Thomas, J., concurring). Justice Thomas further observed that early Americans viewed commerce, manufacturing, and agriculture as strongly interdependent, yet Congress still was not given power over all these activities. *See id.*

76. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (emphasis added). Moreover Marshall admitted that “inspection laws may have a remote and considerable influence on commerce” but nevertheless “form a portion of that immense mass of legislation which embraces every thing within the territory of a State not surrendered to the general government.” *Id.* at 203.

77. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (holding the Bituminous Coal Conservation Act of 1935 unconstitutional because it attempted to regulate mining production, a “purely local activity,” which deals with commodities *before* they reach interstate commerce); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935) (holding the National Industrial Recovery Act unconstitutional as attempting to regulate activities in connection with commodities that had come to “a permanent rest” *after* being in interstate commerce); *Hammer v. Dagenhart*, 247 U.S. 251, 275-76 (1918) (holding the Child Labor Act (which forbade the shipment in interstate commerce of goods manufactured in any plant employing child labor) unconstitutional for attempting to regulate a matter that is purely local in character and reserved to the states under the Tenth Amendment).

78. 234 U.S. 342 (1914)

79. *See id.* at 351. The Court, in permitting the Interstate Commerce Commission to

In another line of cases the Court relied on the "current of commerce" rationale, first articulated in *Swift & Co. v. United States*,⁸⁰ to uphold congressional action under the Commerce Clause.⁸¹ In *Stafford v. Wallace*,⁸² the Court relied on *Swift* to uphold the Packers and Stockyard Act of 1921. That act provided for the regulation of stockyards that arranged for sale and shipment of livestock in interstate commerce. The Court held that "[t]he stockyards are not a place of rest or final destination" but instead are "a throat through which the current flows, and the transactions which occur therein are only incident to this current."⁸³ In so ruling, *Stafford* did not upset the distinction between manufacturing or production in one sphere, and interstate commerce in the other.⁸⁴

These conflicting approaches toward articulating a limit on Congress' Commerce Clause powers—direct versus indirect effects test, manufacturing as distinguished from commerce, ancillary intrastate activities, and the current of commerce—left in place an uneasy substructure, teetering and unstable under the weight of growing congressional exercises of power. In retrospect, these approaches left the constitutional landscape littered with discarded doctrines and a hesitancy toward categorical approaches to the Commerce Clause.⁸⁵

regulate wholly intrastate railroad rates, held that "[w]herever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule." *Id.* at 351-52. *E.C. Knight* was never mentioned in the opinion.

80. 196 U.S. 375 (1905).

81. *See id.* at 397. The *Swift* Court upheld the application of antitrust laws against price fixing by meat dealers operating exclusively intrastate. The Court argued that, unlike in *E.C. Knight* "where the subject-matter of the combination was manufacture and the direct object monopoly of manufacture within a State" and "[h]owever likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end," in this case "the subject-matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales." *Id.* at 397.

82. 258 U.S. 495 (1922).

83. *Id.* at 515-16.

84. Another way to think about it is that if the stockyards were the "throat" through which commerce flowed, then the manufacturing in *E.C. Knight* or the coal mining in *Carter* would be the "food on the plate" that did not yet enter into interstate commerce, while the poultry in *A.L.A. Schechter* would be the "stomach" where the goods in the flow of interstate commerce had come to rest.

85. Actually, in the 1970s, the Court did attempt to fashion a new categorical approach toward defining the limits on commerce power. However, this approach was also abandoned. *See National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). *See infra* notes 110-16 and

4. The New Deal—The Dam Breaks

These conflicting approaches, though aimed at developing a stable Commerce Clause jurisprudence, were too weak to contain the rush of the New Deal. During the early years of the Great Depression the Court was still clinging to a restrictive view of commerce power. Yet the dam holding back federal power that Chief Justice Marshall had constructed in *Gibbons* broke under the weight of a true constitutional revolution brought on by the New Deal.⁸⁶

The watershed case in the New Deal revolution was *NLRB v. Jones & Laughlin Steel Co.*,⁸⁷ where the Court upheld the National Labor Relations Act (Wagner Act) against a Commerce Clause challenge.⁸⁸ The Court simultaneously departed from the direct versus indirect effects test,⁸⁹ declined to rely on the "current of commerce" theory (saying it was merely a particular, not exclusive, expression of commerce power),⁹⁰ and rejected the manufacture or production versus commerce distinction.⁹¹ The Court adopted a new standard, determining that intrastate activities may be regulated by Congress "if they have such a close and substantial relation to

accompanying text.

86. The expansion of federal power was motivated by several factors, but not necessarily by textual necessity. First, outside political pressure from Roosevelt's court-packing plan likely forced some of the Justices to at least reevaluate their view of the Commerce Clause. See G. GUNTHER, *CONSTITUTIONAL LAW*, 128-30 (11th ed. 1985); see also Cirillo & Eisenhofer, *supra* note 43, at 912 (citing Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 731 (1984) (arguing that the Court shifted positions and endorsed the New Deal reform measures following Roosevelt's landslide victory)); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946) (outlining, case by case, the expansion of the commerce power during this era). A principled approach toward construing the Commerce Clause may thus have been adulterated by a political ideology as to the proper relationship between the states and the federal government. Secondly, the dominant intellectual belief during the time—namely, that an active national government was the only effective solution to pressing national problems—was influential among some of the Justices on the Court. See Epstein, *supra* note 62, at 1443. In this way, states' rights were subordinated when the Court was confronted by the political exigencies of the time.

87. 301 U.S. 1 (1937).

88. To support the Wagner Act's constitutionality, Congress set forth findings detailing how labor problems lead to industrial strife or unrest that substantially burdens or affects the flow of commerce. See *id.* at 23 n. 2. In the process, the congressional draftsmen in the Wagner Act expanded the Commerce Clause lexicon by adding the term "affecting commerce"—a term that would become prominent in the modern cases. See *infra* notes 89-95.

89. *Jones & Laughlin*, 301 U.S. at 40-41.

90. See *id.* at 36.

91. See *id.* at 39.

interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."⁹²

A slim majority of the Court was persuaded to expand the commerce power, allowing the National Labor Relations Board ("NLRB") to regulate the labor/management relations of Jones & Laughlin. Although the Court did acknowledge that the commerce power "may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government,"⁹³ the Court was nevertheless shifting its approach. It held that "congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce [since] [b]urdens and obstructions may be due to injurious action springing from other sources."⁹⁴ Moreover, "the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; . . . That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'"⁹⁵ Thus, the Court adopted Marshall's notion of plenary powers in *Gibbons*, but expanded the sphere in which that plenary power could be exercised.

The later New Deal cases confirmed the near evisceration of any substantive limits on Congress' Commerce Clause power. The seminal case is *Wickard v. Filburn*,⁹⁶ where the Court justified congressional regulation of home-grown wheat on the basis that it competes with wheat in interstate commerce. The Court held that Congress could reasonably have concluded that activities, though purely local in nature, when "taken together with that of many others similarly situated," can exert such a substantial influence on interstate commerce that their contribution is "far from trivial."⁹⁷ Thus, the "aggregation principle" significantly expanded congressio-

92. *Id.* at 37.

93. *Id.*

94. *Jones & Laughlin*, 301 U.S. at 36.

95. *Id.* at 36-37 (citations omitted).

96. 317 U.S. 111 (1942) (upholding the application of the Agricultural Adjustment Act to Roscoe C. Filburn, a small farmer in Ohio who consumed most of his own wheat crop. The Act provided the Secretary of Agriculture with the power to set quotas on wheat production).

97. *Id.* at 128.

nal power under the Commerce Clause. Congress could now regulate an entire class of activities even though an individual activity within the class had virtually no effect on interstate commerce. Whether the subject was production, or consumption, or marketing, or whether it had a direct or indirect effect on interstate commerce, was immaterial as long as it exerted a "substantial effect on interstate commerce."⁹⁸

A common thread in the New Deal cases is that all the regulations upheld were enacted for the purpose of promoting economic growth. Following the New Deal, however, Congress invoked the Commerce Clause for social purposes as well.⁹⁹ First, in *Heart of Atlanta v. United States*,¹⁰⁰ the Court upheld the application of Title II of the Civil Rights Act to a downtown Atlanta motel that discriminated against blacks. Although the Act contained no congressional findings, unlike the Act in *Jones & Laughlin*, the Court resorted to the congressional record to find ample evidence of the burdens placed on interstate commerce by racial discrimination.¹⁰¹ Similarly, in *Katzenbach v. McClung*,¹⁰² the Court upheld the application of another provision of Title II of the Civil Rights Act to a southern restaurant engaged in discriminatory practices. The Court concluded, despite the lack of congressional findings, that "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investi-

98. *Id.* at 124-25; see also *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942) (upholding congressional authorization for Secretary of Agriculture to set minimum prices for milk produced and consumed wholly within a single state). The final step in the Commerce Clause transformation of the New Deal came in *United States v. Darby*, 312 U.S. 100 (1941), where the Court, in upholding the Fair Labor Standards Act of 1938, rejected the Tenth Amendment as an independent limitation on commerce power by flatly overruling *Hammer v. Dagenhart* and stating that the Tenth Amendment is but "a truism that all is retained which has not been surrendered." *Id.* at 124.

99. This was not the first time the Court approved the use of the commerce power for social purposes, however. An early important case approving the use of the Commerce Clause as a national police power was *Champion v. Ames*, 188 U.S. 321 (1903) (the Lottery Case), which upheld a congressional prohibition of interstate shipment of lottery tickets. Later cases also upheld the use of the commerce power for reasons of health, morals, and welfare. See *Hipolite Egg Co. v. United States*, 220 U.S. 45, 60 (1911) (upholding the prohibition of the shipment of impure food and drugs); *Hoke v. United States*, 227 U.S. 308, 326 (1913) (upholding the prohibition of the shipment of women across state lines for immoral purposes).

100. 379 U.S. 241 (1964).

101. See *id.* at 252-53.

102. 379 U.S. 294 (1964).

gation is at an end.”¹⁰³ Finally, in *Perez v. United States*,¹⁰⁴ the Court upheld the application of anti-loansharking provisions of the Consumer Credit Protection Act to extortionate credit transactions that were entirely intrastate. The Court reasoned that “[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power ‘to excise as trivial, individual instances’ of the class.”¹⁰⁵

In light of these cases, the modern Commerce Clause standard was summarized by the Court as a combination of a rational basis test and the requirement of some level of “effect” on interstate commerce.¹⁰⁶ Once Congress concludes that an activity affects interstate commerce, “[t]he task of a court . . . is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.”¹⁰⁷ This is a highly deferential standard, so deferential, in fact, that in the mid-1970s the Court turned to the

103. *Id.* at 303-04. The Court in *Katzbach* relied on the *Wickard* rationale and argued that the discriminatory practices of this particular restaurant were representative of many others throughout the country and that Congress could permissibly regulate individual instances of a class that in the aggregate had an effect on interstate commerce. *See id.* at 300-01.

104. 402 U.S. 146 (1971).

105. *Id.* at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). Although there were ample sources on loan sharking in congressional findings and legislative history, the sources did not address the effect of loan sharking on interstate commerce. *See id.* at 154-157. Congress thus did not demonstrate a systematic connection between the activities it sought to regulate and interstate commerce. Nevertheless, the court thought it sufficient that “[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.” *Id.* at 154. However, Justice Stewart in dissent argued that “[i]t is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting. And the circumstances that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.” *Id.* at 157-58 (Stewart, J., dissenting).

106. *See Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276 (1981) (holding that regulations of strip mining practices fall within the commerce power). In *Hodel*, the majority mentioned no requirement of a substantiality of effect on interstate commerce—it only inquired into whether an activity “affected” interstate commerce. *See id.* at 276. However, Justice Rehnquist in concurrence argued that the Commerce Clause required Congress to demonstrate a “substantial effect” on interstate commerce. *Id.* at 310-11 (Rehnquist, J., concurring). The conflict was resolved by *United States v. Lopez* in 1995 in favor of the latter. An activity must have a *substantial* affect on interstate commerce. *Lopez*, 115 S. Ct. at 1630. *See infra* note 134 and accompanying text.

107. *Hodel*, 254 U.S. at 276 (citations omitted). The only other question for the Court is whether the means chosen by Congress are “reasonably adapted to the end permitted by the Constitution.” *Id.* (quoting *Heart of Atlanta v. United States*, 379 U.S. 241, 262 (1964)).

Tenth Amendment as a vehicle to strike down Commerce Clause regulation that unduly trammelled upon the states. First, however, the Tenth Amendment had to be revived following its New Deal emasculation.

5. Resurrection of the Tenth Amendment

The use of the Tenth Amendment as a separate, substantive limit on Congress' commerce power was effectively gutted by the New Deal Court in *United States v. Darby*.¹⁰⁸ The Court declared that the Tenth Amendment is but a "truism that all is retained which has not been surrendered."¹⁰⁹ In 1976, however, with the prospect of unlimited congressional power under the Commerce Clause, the Court breathed new life into the Tenth Amendment. The Court, in *National League of Cities v. Usery*,¹¹⁰ held that Congress did not have the constitutional authority to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA") against state and municipal employees because such regulations intruded on state sovereignty. In doing so, the Court clarified the three-prong test it had articulated in *Hodel*—the "traditional governmental functions"—test for determining when Congress has violated the Tenth Amendment. Under this test states are exempt from congressional regulation if (1) the federal law regulates the "States as States," (2) the federal regulation addresses matters that are indisputably "attribute[s] of state sovereignty," and (3) that states' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."¹¹¹ The traditional governmental functions test represented a substantive conception of federalism because certain state activities were absolutely immune from congressional regulation under the Commerce Clause if those activities were essential to the states functioning as states.

The traditional governmental functions test was short-lived, however.¹¹² Although it had been applied consistently every time

108. 312 U.S. 100 (1941).

109. *Id.* at 124.

110. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

111. *Hodel*, 452 U.S. at 285-88 (citing *National League*, 426 U.S. at 854-54). However, even if all the elements are satisfied, the Tenth Amendment challenge to congressional regulation under the Commerce Clause might still fail if "the nature of the federal interest advanced [is] such that it justifies state submission." *Id.* at 288 n.29; *see also National League*, 426 U.S. at 856 (Blackmun, J., concurring).

112. Comparing the relation between the First and Tenth Amendment reveals that the

it was invoked,¹¹³ the Court in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*¹¹⁴ declared the test "unworkable" and overruled it.¹¹⁵ In sustaining the constitutional applicability of the FLSA to state and local employees, the Court in *Garcia* declared that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."¹¹⁶ Put differently, the

National League experiment failed because of the manner in which the argument was framed. For example, if Congress passed a statute forbidding all newspapers espousing Republican views from distributing their papers in interstate commerce, such an enactment would be within the commerce power. However, the First Amendment would act as a sword to strike down the statute because, through the exercise of its powers, Congress invaded a sphere of activity reserved to individuals under the First Amendment that is beyond government reach. The First Amendment "would undoubtedly invalidate the law, despite its prima facie authorization by the commerce clause." Redish & Drizin, *supra* note 42, at 10.

The argument in *National League* failed because once the Court conceded that Congress could regulate the hours and wages of state and municipal employees through the commerce power, *see National League*, 426 U.S. at 833, 836, then such a regulation could not logically be a sphere of authority reserved to the states under the Tenth Amendment. Since the "particular power has been given to the federal government, . . . then that power is tautologically not reserved to the states by the Tenth Amendment." Redish & Drizin, *supra* note 42, at 10-11 (emphasis omitted). In this sense, the Tenth Amendment argument in *National League* failed before the "traditional governmental functions" test was even applied. *See id.* at 11. The Tenth Amendment could not be construed as a sword to strike down a federal statute if the congressional exercise of power did not invade a sphere of authority reserved to the states. *See id.*

As a result, the Tenth Amendment may have more value if it is thought of as a shield against federal power. Rather than the commerce power extending to a sphere of state authority and being struck down by the Tenth Amendment sword, the commerce power would not extend to that sphere in the first instance because of the Tenth Amendment shield protecting domains reserved exclusively to the states. Antithetically, a conception of the Commerce Clause that encompasses all enclaves of state authority is inconsistent with the structure of the Constitution. It leaves the Tenth Amendment devoid of meaning. *See id.* at 42.

113. Not a single federal statute was struck down under the *National League/Hodel* formulation. *See United Transportation Union v. Long Island Railroad*, 455 U.S. 678, 688-90 (1982) (upholding the applicability of the Railway Labor Act's collective bargaining provisions to a state-owned railroad); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 770-71 (1982) (upholding provisions of the Public Utilities Regulatory Policies Act of 1978 requiring state utilities commissioners to consider rate structuring approaches); *EEOC v. Wyoming*, 460 U.S. 226, 228-29 (1983) (upholding the application of the Age Discrimination in Employment Act to Wyoming state employees because compliance with federal law would not seriously impair a traditional governmental function).

114. 469 U.S. 528 (1985).

115. Ironically, it was Justice Blackmun, who had cast the deciding vote in the 5-4 decision in *National League*, who joined Justices Brennan, Marshall, Stevens, and White (the four dissenting justices in *National League*) to overrule *National League* in *Garcia*. Compare *National League*, 426 U.S. at 856, with *Garcia*, 469 U.S. at 530.

116. 469 U.S. at 554.

integrity of the states in areas of local concern would be secured through the political process rather than from substantive limits on federal power under the Constitution.

The *Garcia* decision appeared to signal a complete reversal and a nearly complete judicial abrogation in the field of demarcating federal and state prerogatives under the Tenth Amendment.¹¹⁷ However, in 1992 the Court once again revitalized the Tenth Amendment as a potential limit on federal authority. In *New York v. United States*,¹¹⁸ the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments of 1985. The Act required that states arrange for the disposal, whether in-state or out-of-state, of low-level radioactive waste generated within the states. The Act provided a number of incentives to accomplish its goals. One of the incentives provided that if the state had failed to arrange for proper disposal of radioactive waste by 1993, it would have to "take title" to the waste and be liable for all damages directly and indirectly incurred.¹¹⁹ Justice O'Connor, writing for the majority, struck down the "take title" provision as violative of the Tenth Amendment because it entailed that Congress "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."¹²⁰ The "take title" provision was constitutionally deficient because it represented the "choice between two unconstitutionally coercive regulatory techniques [which] is no choice at all."¹²¹

New York is significant in that it signals a departure from *Garcia* which relied almost exclusively on the political process to protect states' interests. *New York* shows that there are *some* judicial checks on congressional power. Nevertheless, it is easy to overstate the importance of *New York* since, substantively, it still permits Congress to regulate expansively as long as Congress affords states a nominal choice among alternatives—such as conditioning the receipt of federal monies on state compliance with federal policy. Justice O'Connor's Tenth Amendment jurisprudence

117. *Garcia* does not represent a *complete* judicial abrogation in the field of federalism since the Court will still intervene when the integrity of the political process is compromised. See Kramer, *supra* note 11, at 1486 n.3.

118. 505 U.S. 144 (1992).

119. *Id.* at 175.

120. *Id.* at 176.

121. *Id.*

is, therefore, a procedural limits model rather than a substantive limits model.

Justice O'Connor's view of federalism can perhaps be demonstrated more definitively by her opinion in *Gregory v. Ashcroft*.¹²² O'Connor, writing for the majority, set forth a particularly demanding "clear statement" requirement. This requires that Congress must clearly state its intention when it seeks to invade an area of state sovereignty pursuant to the Commerce Clause.¹²³ In *Gregory*, appointed Missouri State judges challenged a state mandatory retirement provision alleging it violated the federal Age Discrimination in Employment Act of 1967 ("ADEA"). The Court held that the ADEA did not apply to the state's mandatory retirement provision because Congress did not "make it clear" that the judges were included.¹²⁴

Essentially, the clear statement requirement is a procedural device designed to encourage a more thoughtful congressional process, not just by "forc[ing] the objection based on the invasion of state sovereignty onto the congressional agenda, but also . . . highlight[ing] it."¹²⁵ Like *New York*, however, *Gregory* represents a procedural conception of federalism, rather than a substantive conception as in *National League*. This is so because Congress is not absolutely barred from regulating any sphere of state activity under the Tenth Amendment. Rather, Congress must merely satisfy procedural requirements. Thus, based on the synthesis of the procedural conception of federalism under the Tenth Amendment and the highly deferential rational basis test under the Commerce Clause, there seemed to be virtually no judicially mandated limits on the scope of Congress' commerce power—at least no substantive limits. Then came *Lopez*.

6. *United States v. Lopez*

In *United States v. Lopez*,¹²⁶ the Court for the first time in nearly sixty years struck down a congressional regulation under the Commerce Clause that attempted to regulate individuals.¹²⁷ In

122. 501 U.S. 452 (1991).

123. *See id.* at 464.

124. *Id.* at 467.

125. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 722 (1996) (discussing the role that congressional processes and findings play in assessing the constitutionality of federal legislation).

126. 115 S. Ct. 1624 (1995).

127. In 1936 the Court struck down the Bituminous Coal Conservation Act. *See Carter*

Lopez, the court considered the constitutionality of the Gun-Free School Zones Act of 1990 which made it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹²⁸ Chief Justice Rehnquist, writing for the Court, opened his opinion by setting forth a basic principle inherent in our constitutional scheme—that the Constitution creates a federal government with enumerated powers.¹²⁹ Oddly, however, he then went on to reaffirm the post-New Deal jurisprudence of the Court under the Commerce Clause, including such far-reaching cases as *Wickard*.¹³⁰

Rehnquist set forth the tripartite framework defining the categories of activities that the Commerce Clause primarily reaches. First, "Congress may regulate the use of the channels of interstate commerce."¹³¹ Second, Congress has power "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."¹³² Finally, Congress has the power to regulate "activities that substantially affect interstate commerce."¹³³ Rehnquist noted that the case law pertaining to the third category was vague as to whether an activity must "affect" or "substantially affect" interstate commerce. He resolved the vagueness, holding that "consistent with the great weight of our case law . . . the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."¹³⁴ Rehnquist held that the Gun-Free School Zones Act was properly analyzed under the third category.¹³⁵

In finding the Gun-Free School Zones Act unconstitutional, Rehnquist relied on two primary arguments. First, he was able to distinguish the outcome of *Lopez* from the framework of cases like *Wickard*, *Heart of Atlanta*, *Katzenbach*, and *Perez* by facially dis-

v. *Carter Coal Co.*, 298 U.S. 238 (1936).

128. 18 U.S.C. § 922(q)(2)(A) (1994) (originally codified at 18 U.S.C. § 922(q)(1)(A)).

129. *See Lopez*, 115 S. Ct. at 1626.

130. *See id.* at 1627-29.

131. *Id.* at 1629.

132. *Id.*

133. *Id.* at 1630.

134. *Lopez*, 115 S. Ct. at 1630.

135. *See id.* The regulation under the Access Act may involve a congressional exercise of power under this category. Cf. *United States v. Wilson*, 73 F.3d 675, 687-88 (7th Cir. 1995) (stating that the Access Act could qualify under the second category—as a regulation of an instrumentality of interstate commerce—but that such a holding is "unnecessary without further guidance from the Supreme Court").

tinguishing them. Unlike those cases, which dealt with some form of commercial or economic activity, Rehnquist argued the Gun-Free Schools Zones Act was a criminal statute that had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."¹³⁶ Thus, he was able to cite those cases for the proposition that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."¹³⁷ Secondly, the Chief Justice noted that the Act "contain[ed] no jurisdictional element that would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."¹³⁸

Rehnquist also commented on the lack of any congressional findings that would support the Act's passage. He did acknowledge, in line with precedent, that Congress is not required to make specific findings that an activity substantially affects interstate commerce in order to legislate under the Commerce Clause.¹³⁹ Nevertheless, the existence of congressional findings would have aided the Court in determining whether the possession of firearms in a school zone substantially affects interstate commerce.¹⁴⁰

The Government advanced two arguments for the constitutionality of the act. The first was the "cost of crime" rationale. The Government claimed that there are substantial costs from violent

136. *Lopez*, 115 S. Ct. at 1630-31.

137. *Id.* at 1630.

138. *Id.* at 1631. Rehnquist then cited *United States v. Bass*, 404 U.S. 336, 339 (1971), in which the Court struck down the conviction of an individual under Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (former 18 U.S.C. § 1202(a)) which made it a felony to "receive, possess, or transport in commerce or affecting commerce . . . any firearm." The Court in *Bass* found an insufficient nexus between the possession component of § 1202(a) and interstate commerce. *Bass*, 404 U.S. at 350. Since it was unclear whether the statute required the possession to be in or affecting commerce, the Court would not adopt a broad reading of the statute absent "a clearer direction from Congress." *Id.* at 339. Significantly, the Court did not reach the question of whether such an interpretation was necessary under the Commerce Clause. See also *United States v. Five Gambling Devices*, 346 U.S. 441, 452 (1953) (deciding only the question of statutory construction of the act).

139. See *Lopez*, 115 S. Ct. at 1631 (citing *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) and *Perez v. United States*, 402 U.S. 146, 156 (1971)).

140. See *id.* at 1632. While the Gun-Free School Zones Act contained no congressional findings evidencing the effect of gun possession near schools on interstate commerce, Congress did retroactively adopt such findings after the grant of certiorari but before oral argument in *Lopez*. See *id.* at 1632 n.4 (Pub. L. No. 103-322 § 320904, 108 Stat. 1796, 2125 (1994)). The Government did not rely on these subsequent findings as a surrogate for the original lack of findings in the Act, but it did argue that it established a rational basis for Congress to regulate this activity. See *id.*

crime and that these costs are spread throughout society through insurance.¹⁴¹ The second argument was a “national productivity” rationale. The Government claimed that interstate travel is reduced by the presence of violent crime. Moreover, the presence of guns in schools handicaps the learning environment, which in turn adversely affects national productivity, which in turn threatens the country’s well-being.¹⁴² Rehnquist rejected these claims, arguing that based on them, Congress could regulate virtually any activity under the Commerce Clause, including marriage, divorce, and child custody, on the theory that they affect national economic productivity.¹⁴³ Thus, he was unwilling to transform the Commerce Clause into a “general police power of the sort retained by the States.”¹⁴⁴

What Rehnquist and the majority were willing to do, however, has been disputed. While the Court refused to do away with its New Deal jurisprudence, its rhetoric suggests that the Court has set limits on a sphere of regulatory authority which, at least prior to *Lopez*, was believed to be well within congressional reach. Ultimately, *Lopez* may have revitalized the debate over federalism.

141. See *id.* at 1632.

142. See *id.*

143. See *id.* Indeed, Rehnquist criticized Justice Breyer for being “unable to identify any activity that the States may regulate but Congress may not.” *Id.*

144. *Lopez* 115 S. Ct. at 1634. Justice Thomas went further and claimed that the “substantial effects” test, “if taken to its logical extreme would give Congress a ‘police power’ over all aspects of American life.” *Id.* at 1642 (Thomas, J., concurring). Justice Thomas was prepared to do away with the “substantial effects” test altogether, observing that the Court’s jurisprudence had drifted far from the original understanding of the Commerce Clause and that the Framers believed that even many matters that had a substantial affect on interstate commerce would nevertheless be outside the reach of the national government. See *id.* at 1642-44. Justice Thomas offered strong evidence that “[e]arly Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other—that each ‘substantially affected’ the others.” *Id.* at 1645. Still, they were outside the federal regulatory sphere.

Four justices, however, rejected Justice Thomas’ invitation to return to a construction of the Commerce Clause that “is more faithful to the original understanding.” *Id.* at 1642 (Thomas, J., concurring). Justice Breyer, who wrote the principal dissent, argued that the Gun-Free School Zones Act “falls well within the scope of the commerce power as this Court has understood that power over the last-century.” *Id.* at 1657 (Breyer, J., dissenting). Justice Breyer argued that “Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.” *Id.* at 1658. Under the rational basis test, therefore, the question before the Court “is not whether the ‘regulated activity sufficiently affected interstate commerce,’ but, rather, whether Congress could have had ‘a rational basis’ for so concluding.” *Id.* at 1629.

However, the Court's decision contains two widely divergent conceptions of federalism that now compete for the true meaning of *Lopez*. The two conceptions parallel the procedural and substantive approaches to the Tenth Amendment. It is the purpose of the next section to provide a framework through which to analyze the constitutionality of the Access Act by articulating in detail these two distinct conceptions of federalism.

II. A DETAILED ANALYSIS AND CRITIQUE OF THE ACCESS ACT UNDER THE COMMERCE CLAUSE

A. Two Guiding Conceptions of *Lopez*

1. The Procedural Conception of Federalism

The first conception of federalism coming out of *Lopez* is based on a procedural constraint model, similar to Congress' power vis-a-vis the Tenth Amendment in cases like *Gregory* and *New York*. It is a procedural constraint model because Congress must merely satisfy particular procedural requirements before passing legislation.¹⁴⁵ Under the procedural conception of federalism, the Commerce Clause would not be limited to any particular sphere of activity. Congress would have free rein to regulate any human activity on the assumption that all activities affect interstate commerce in our modern, highly integrated economy. The only real limits would be in the form of requirements pertaining to legislative findings, clear statements, or nexus requirements. Thus, Congress could still criminalize the possession of guns near schools if it includes a jurisdictional element demonstrating a nexus of the firearm to interstate commerce.¹⁴⁶ For example, if the gun had once traveled across state lines, that would provide a basis for

145. See discussion *supra* notes 119-25.

146. See H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651, 651-52 (1995) (arguing that "as a practical matter, the main effect of *Lopez* is very likely to be nothing more than a renewed congressional interest in loading federal criminal statutes with findings and 'jurisdictional element[s]'" (footnote omitted). Under the procedural conception, if Congress passed the Gun-Free School Zones Act of 1996 and included a jurisdictional element establishing a nexus between the gun and interstate commerce, the Court might find it constitutional. See Stephen M. McJohn, *The Impact of United States v. Lopez: The New Hybrid Commerce Clause*, 34 DUQ. L. REV. 1, 34-35 (1995) In fact, the bill for a new Gun-Free School Zones Act was recently introduced by Senator Kohl. It is expected to remedy the procedural shortcomings of the 1990 statute. See S. 890, 104th Cong. (1995).

Congress to regulate.¹⁴⁷ Alternatively, Congress could adopt findings that detail the substantial effect that guns near schools have on interstate commerce.¹⁴⁸ The point of the procedural conception of *Lopez*, ultimately, is to encourage Congress to deliberate more fully on the wisdom of statutes that alter the balance of federalism.¹⁴⁹ It is not intended to reserve any sphere of activity exclusively for the states.

The procedural conception of federalism in *Lopez* is drawn from both the language of the decision itself as well as from coinciding events that "may portend more stability in Commerce Clause jurisprudence than some Court watchers initially predicted."¹⁵⁰ First, as noted, the Court reaffirmed its New Deal cases.¹⁵¹ In do-

147. See *United States v. Bass*, 404 U.S. 336, 350 (1971) (noting that government meets its burden if it can prove that the firearm has travelled in interstate commerce). If the lack of a jurisdictional element was the determinative factor, however, then it would seem to be unnecessary for the Court in *Lopez* to state that gun possession in a school zone has nothing to do with commerce or any economic enterprise. See *Lopez*, 115 S. Ct. at 1631-33. The prudent approach would have been to write a narrow opinion. Perhaps, as Professor Brickey suggests, the Court wanted to provide "a reminder that the Court's policy of deferring to congressional judgments is not a presumption of congressional infallibility." Brickey, *supra* note 15, at 843.

148. Though the majority in *Lopez* noted that Congress "is not [normally] required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *Lopez*, 115 S. Ct. at 1631, it said that "findings would enable [it] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Id.* at 1632. Indeed, Congress may well conclude that gun possession near a school is related to commerce. If the Court wanted to declare that Congress did not have a rational basis for its conclusion, it would have to overrule a major part of its modern Commerce Clause jurisprudence. The Court in *Lopez* said that the Gun-Free School Zones Act had nothing to do with commerce or an economic enterprise. See *Lopez*, 115 S. Ct. at 1630-31. However, the possession of guns in a school zone can clearly have a substantial effect on interstate commerce. "Gun possession in schools can affect education, which undoubtedly has economic effects on salaries and productivity, and can affect the market for guns and whether they flow from state to state." McJohn, *supra* note 146, at 28 n.211. In fact, guns near schools that disrupt the learning environment can have even greater commercial ramifications than anti-abortion activities under the Access Act. While the latter could harm the commercial health of reproductive clinics across the country, the former could have a deleterious effect on the entire economy.

149. See McJohn, *supra* note 146, at 39 (arguing that "*Lopez* may ultimately amount to a rule encouraging a measure of deliberation in the political process without hobbling Congress"). Professor McJohn suggests that "the principal effect of *Lopez* is that of a clear statement rule." *Id.* at 38. It essentially means that "[i]f Congress intends to take action pursuant to the commerce power which interferes with the way a state exercises its sovereign powers, then Congress must take pains to be very clear about it." *Id.* at 22-23. Practically speaking, however, it means no real substantive constraint on Congress.

150. Brickey, *supra* note 15, at 833.

151. See *Lopez*, 115 S. Ct. at 1630.

ing so, the Court may have conceded that the political process can adequately safeguard the balance between the federal government and the states. The New Deal jurisprudence implicitly captures this notion. Under cases like *Wickard*, for example, the commerce power is defined so broadly that it subsumes virtually all activities otherwise belonging to the states.¹⁵² Thus, even though the Court continues to hold that there are indeed judicial limits to the commerce power,¹⁵³ the New Deal construction of the Commerce Clause is so broad that the Court may have implicitly adopted the philosophy of *Garcia*. The philosophy holds that congressional self-restraint is the primary limit on the Commerce Clause.¹⁵⁴

Second, *Lopez* was only one of two Commerce Clause cases decided during the Court's term. One week after *Lopez*, in a per curiam opinion, the Court decided *United States v. Robertson*.¹⁵⁵ The Court reversed a Ninth Circuit decision, overturning a conviction in connection with an alleged RICO enterprise on the ground that there was insufficient evidence that the enterprise was engaged in or affected commerce.¹⁵⁶ Some commentators suggested that *Robertson* sends "a clear message that *Lopez* was no blockbuster."¹⁵⁷ More telling, however, may be the Court's denial of certiorari¹⁵⁸ in four other cases dealing with interstate commerce.¹⁵⁹

152. See Kramer, *supra* note 11, at 1487.

153. See *Lopez*, 115 S. Ct. at 1628-29.

154. Actually, even under *Garcia*, the Court would intervene when the integrity of the political process was compromised. See Kramer, *supra* note 11, at 1486, n.3. Nevertheless, the general tenor of *Garcia* reflects an inherent trust in Congress to properly draw the lines of federalism.

155. 115 S. Ct. 1732 (1995).

156. *United States v. Robertson*, 15 F.3d 862, 868 (9th Cir. 1994). The alleged RICO enterprise in *Robertson* was a gold mine located in Alaska. Virtually all of the gold obtained from the mine was sold inside the state. See *id.* The Ninth Circuit found that the interstate commerce nexus was not satisfied because the local activity of the mine had merely "an incidental effect" on interstate commerce. See *id.* The Supreme Court overruled the Ninth Circuit without even mentioning *Lopez*. *Robertson*, 115 S. Ct. at 1733. The Court held that the Ninth Circuit's inquiry into the question of whether the gold mine activities "affected" interstate commerce was unnecessary because the "affecting commerce" analysis was only applicable to questions "of Congress' power over purely intrastate commercial activities that nonetheless have substantial interstate effects." *Id.* The Court cited *Wickard* for this proposition with no mention of *Lopez*.

157. W. John Moore, *A Landmark Decision? Maybe Not*, 27 NAT'L L.J. 1131 (1995).

158. Some caution is appropriate before attributing too much weight to denials of certiorari since the Court has stated that no inference is to be drawn from such denials. See *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 366 n.1 (1973) (citing *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950)). On the other hand, there is also evidence that denials of certiorari do have significance. See Deborah Jones Merritt, *Com-*

The Fourth Circuit's decision in *United States v. Ramey*,¹⁶⁰ for example, offered a particularly attractive opportunity for the Court to build on *Lopez*.

Ramey involved the conviction of two individuals for the arson of a building in an activity affecting commerce under Title XI of the Organized Crime Control Act of 1970.¹⁶¹ The two had burned down a mobile home occupied by an interracial couple.¹⁶² Rejecting the defendants' Commerce Clause challenge, the Fourth Circuit found that the mobile home had received electricity from an interstate commerce power grid. The court reasoned that although "the trailer doubtless consumed but a pittance of energy from the power company's grid, its consumption, combined with that of all similar-

mercel, 94 MICH. L. REV. 674, 735-76 n.278-79 (1995).

159. First, the Court denied certiorari petitions in two cases where lower courts had upheld the Anti-Car Theft Act of 1992, 18 U.S.C. § 2119 (1994), against Commerce Clause challenges. *See Overstreet v. United States*, 40 F.3d 1090, 1092-93 (10th Cir. 1994) (holding that carjacking statute came within Congress' power under the commerce clause), *cert. denied*, 115 S. Ct. 1970 (1995); *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1825 (1995). Under the Anti-Car Theft Act, a person is guilty of carjacking if he or she "takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so [while in the possession of a firearm]." 18 U.S.C. § 2119 (1994). The issues raised by the carjacking statute gave the Court the opportunity to comment on the significance, if any, of *Lopez*. For example, if an automobile that had been shipped in interstate commerce 50 years ago and had since come to a rest could be reached by the statute, then Congress could federalize countless other local crimes. Similarly, the robbery of a local convenience store could be made a federal crime since most of the merchant's goods for sale came from out-of-state. *See United States v. Cortner*, 834 F. Supp. 242, 243 (M.D. Tenn. 1993), *rev'd sub nom. United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994).

The Court also denied certiorari petitions in two cases upholding a federal statute making arson of a building used in an activity affecting commerce a federal crime. 18 U.S.C. § 884(i) (1994) (stating that one who maliciously damages or destroys property used in interstate commerce shall be imprisoned not more than 20 years). *See United States v. Ramey*, 24 F.3d 602, 607 (4th Cir. 1994) (noting that defendants were convicted of arson of a building used in activity affecting interstate commerce), *cert. denied*, 115 S. Ct. 1838 (1995); *United States v. Moore*, 25 F.3d 1042 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995). Justice Scalia, however, did write that in both cases he would have granted the petitions, vacated the judgments, and remanded the cases back to the Fourth Circuit "for further consideration in light of [*Lopez*]." *Ramey*, 115 S. Ct. 1838; *Moore*, 115 S. Ct. 1838.

160. 24 F.3d 602 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995).

161. 18 U.S.C. § 844(i) (1994) (setting forth maximum penalties for malicious damage by fire or explosives to any real or personal property in violation of the act).

162. *See Ramey*, 24 F.3d at 604. The testimony at trial revealed that the two defendants made derogatory statements about blacks and expressed hatred of the mobile home occupants, indicating that they acted out of personal hatred rather than any economic motive. *See id.* at 605.

ly situated buildings, has a most definite effect on interstate commerce."¹⁶³ For the Fourth Circuit, this meager connection to commerce satisfied that criminal statute's requirement of the "use" in an activity that "affects" commerce.¹⁶⁴ The Fourth Circuit summed up its view of modern Commerce Clause jurisprudence by arguing that "[a]s a practical matter, at least since the watershed decisions of 1937-1942, the political process, and not the courts, has been the States' only real defense against commerce-based federal incursions."¹⁶⁵

163. *Id.* at 607. In *Russell v. United States*, 471 U.S. 858, 862 (1985), the Supreme Court speculated that Congress' constitutional authority under § 844(i) might not protect "every private home." However, the Court did hold that Congress had intended to use its full power under the Commerce Clause "to protect all business property." *Id.* The Fourth Circuit, however, suggested that *Russell* implicitly rejected the rationale that § 844(i) did not apply to merely commercial property and argued that Congress' commerce power reaches farther. See *Ramey*, 24 F.3d at 607. Specifically, the Fourth Circuit in *Ramey* dismissed the Second Circuit's reasoning in *United States v. Mennuti*, 639 F.2d 107 (2nd Cir. 1981) that § 844(i) applied only to property used for a commercial purpose. See *Ramey*, 24 F.3d at 607. It favorably cited the Seventh Circuit in *United States v. Stillwell*, 900 F.2d 1104 (7th Cir.), *cert. denied*, 498 U.S. 838 (1990), which held that the receipt of natural gas that had moved in interstate commerce was a sufficient basis to sustain Congress' jurisdiction over the activity. See *Ramey*, 24 F.3d at 607.

164. See *Ramey*, 24 F.3d at 607 n.7. The Court also considered an alternative rationale—that the mobile home had been manufactured in North Carolina before it came to rest in West Virginia where it was burned—but it ultimately opted to ground the disposition of the case on the other rationale. See *id.* at 607.

165. *Id.* at 606 (footnotes omitted). To support its claim, the Fourth Circuit cited Chief Justice Marshall:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from . . . abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Id. at 606 n. 5. Chief Justice Marshall said this, however, in the context of a discussion of powers that Congress had already possessed—such as the power to declare war. Clearly, the "sole restraint" on a declaration of war would necessarily have to be with the wisdom of Congress since citizens could not rely on the judiciary to restrain Congress from legitimately exercising a power enumerated specifically in Article I. By contrast, Marshall might dispute that citizens would be required to rely solely on congressional restraint if Congress tried to declare war without the necessary two-thirds vote of both houses. See generally U.S. CONST. art. I, § 8, cl. 11. Similarly, with the commerce power, Marshall would likely dispute that the wisdom and discretion of Congress would be the sole restraints since in the sentence immediately preceding the quote used by the Fourth Circuit in *Ramey*, Marshall discussed how Congress's power, though plenary, is "limited to specified objects." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). Marshall's language seems to repudiate the notion that the Court should abdicate oversight of Congress while it is exercising its power within its limited sphere.

The *Ramey* decision was an appealing case, based on its facts and reasoning, for the Supreme Court to further develop its Commerce Clause jurisprudence following *Lopez*. Clearly, the Fourth Circuit places great reliance on the political process—the touchstone of the procedural conception of *Lopez*—as a limit on Congress' commerce power. And political process approach to federalism is not without its adherents. Theorists like Herbert Weschler¹⁶⁶ and Jesse H. Choper¹⁶⁷ have proposed that the safeguards of the political process can more properly allocate power between the federal and state governments under the Commerce Clause.¹⁶⁸ Choper, for example, identifies several “structural aspects of the national political system [that] serve to assure that states' rights will not be trampled.”¹⁶⁹

The political process argument, however, has serious shortcomings¹⁷⁰—shortcomings that are exacerbated by the fact that Congress is motivated by irresistible political pressures to look “tough on crime.”¹⁷¹ The politics of crime make it highly unlikely that

166. HERBERT WESCHLER, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49 (1961).

167. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

168. See also Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623 (1994); WECHSLER, *supra* note 166.

169. CHOPER, *supra* note 167, at 176. Weschler stresses similar themes. See WECHSLER, *supra* note 166, at 54. The political safeguards include such structural features as how congressional representation is allotted by states, how states have authority to draw district lines, how states have the right to determine qualifications to vote, and how each state is equally represented in the Senate which selected its members, at least before the adoption of the Seventeenth Amendment in 1913, through state legislatures. See CHOPER, *supra* note 167, at 176-81. Similarly, the Court in *Garcia* observed that “the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.” *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550-51 (1985) (footnote omitted).

170. Several commentators, for example, have expressed doubts about the political process as a safeguard against federal power. See, e.g., William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789 (1985); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 15-22 (1988); Martin H. Redish, *Federalism, the Constitution, and American Political Theory*, in THE CONSTITUTION AS POLITICAL STRUCTURE ch. 23 (1995).

171. The district court in *United States v. Ornelas*, 841 F. Supp. 1087, 1093 (D. Colo. 1994), *rev'd mem.*, 56 F.3d 78 (10th Cir. 1995), made this observation about the need to look tough on crime. It also argued that “the *Garcia* Court's confidence in the political process to deter the zeal of Congress to centralize prosecutorial power may have been too optimistic.” *Id.*; see also Merritt, *supra* note 158, at 707-09 (arguing that the pressure to

Congress will be a model of self-restraint. This only serves to underscore the shortcomings of the procedural conception of *Lopez*. As Justice Kennedy noted in *Lopez*, the balance between the federal and state governments is easily tipped in favor of the former as a result of momentary political convenience.¹⁷² Thus, despite the added measure of congressional deliberation before a statute is passed, congressional self-restraint is nevertheless hard to come by. This is especially so when, as Professor William P. Marshall accurately observes, "virtually every constituency supports federalization when it is consistent with their own substantive agenda."¹⁷³

Most importantly, however, the political process approach to federalism is inconsistent with the constitutional structure. The Framers understood that the political process would afford states some measure of protection against an overreaching federal government.¹⁷⁴ Despite that understanding, the Framers added additional protection through a system of enumerated powers.¹⁷⁵ Thus, it seems to pervert the constitutional framework if the Court can decide which constitutional values it will enforce and which values it will relegate to the "Darwinism of the political process."¹⁷⁶ The Court's refusal to upset the Fourth Circuit's view in *Ramey* is disappointing because "without some substantive limitation on

look tough on crime drives Congress to pass new federal criminal laws even though they duplicate existing state laws); Brickey, *supra* note 15, at 839 (arguing that much of the current federalization of criminal law duplicates or overlaps state crimes).

172. See *Lopez*, 115 S. Ct. at 1639 (Kennedy, J., concurring). Justice Kennedy argued that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.*

173. William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 722 (1995) (citing the abortion debate as an example where, even if *Roe v. Wade* were overturned, both sides have indicated that the struggle would be waged in Congress, rather than in state legislatures).

174. See *supra* note 165.

175. See Redish & Drizin, *supra* note 42, at 39. Redish and Drizin argue that:

Had the framers been confident that the political process, standing alone, would provide sufficient protection to state interests, presumably they would have expressly vested in the federal government carte blanche to do what it deemed advisable. They clearly did not do so, and the states themselves, unwilling to rely solely on the enumeration structure of article I, insisted on insertion of the even more explicit tenth amendment as a condition for ratification. Rather than supporting Dean Choper's position, evidence of the framers' understanding of ways in which the political process protects federalism actually undermines his conclusion.

Id. (footnote omitted).

176. See *id.* at 12.

congressional power, federalism becomes nothing more than an unenforceable promise of congressional self-restraint.”¹⁷⁷ Fortunately, it is plausible that *Lopez* embodies a second conception of federalism—a substantive conception.

2. The Substantive Conception of Federalism

Briefly, and to be explored in more depth later,¹⁷⁸ the substantive conception of federalism in *Lopez* is drawn from the Court’s rhetoric which “clearly envisions substantive limits on the federal government’s power to legislate on local matters.”¹⁷⁹ Under the substantive conception of federalism, Congress’ power under the Commerce Clause would be limited strictly to commercial activities. The Court would have to make “a determination whether an intrastate activity is commercial or noncommercial.”¹⁸⁰ Congress would still determine whether an activity “substantially affects” interstate commerce, as a question of fact, but the Court would determine whether an activity is a “commercial activity” subject to the commerce power, as a question of law.

Concededly, the majority in *Lopez* never explicitly held that the regulated activity must be of a commercial nature before it may be regulated by Congress. However, the Court did draw the distinction between commercial and noncommercial activities several times¹⁸¹

177. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1818 (1995).

178. See *infra* Part III.

179. McJohn, *supra* note 146, at 3.

180. *Lopez*, 115 S. Ct. at 1633. It is unclear whether the decision in *Lopez* actually turned on the distinction between commercial and noncommercial activities or on the absence of congressional findings or the lack of a jurisdictional element. Yet the dissent in *Lopez* sensed the majority’s distinction between commercial and noncommercial activities and argued that it is one of “hopeless porosity” and that it “looks much like the old distinction between what directly affects commerce and what touches it only indirectly.” *Id.* at 1654 (Souter, J., dissenting). However, the commercial versus noncommercial distinction is qualitatively different from the direct/indirect test of *E.C. Knight* alluded to by the dissent. The latter standard was a test of degree that required a court to make an empirical judgment as to the level of effect an activity needed to have on interstate commerce before Congress could regulate. By contrast, the commercial activity standard is categorical in approach—more akin to the “integral governmental functions” test in *National League*—because it requires courts to evaluate the nature of an activity to determine if it can properly be deemed “commercial.” Yet unlike the *National League* standard, the distinction between commercial and noncommercial activities is far more judicially manageable. See *infra* Part III. The commercial versus noncommercial distinction is actually closer to the “manufacturing versus commerce” standard in *E.C. Knight*.

181. See *Lopez*, 115 S. Ct. at 1633 (“We do not doubt that Congress has authority under the Commerce Clause to regulate numerous *commercial activities* that substantially affect interstate commerce and also affect the educational process.”) (emphasis added); *id.*

and relied on this distinction when it argued that gun possession has "nothing to do with 'commerce' or any sort of economic enterprise."¹⁸² Thus, it is possible that the Court in *Lopez* was articulating a substantive conception of federalism as a categorical limit on Congress' authority.¹⁸³ Ultimately, however, while it is still a matter of contention whether the Court was truly articulating a commercial activities requirement, it is in this framework (procedural versus substantive conception of federalism) that the constitutionality of the Access Act must be analyzed.

B. The Constitutionality of the Access Act within the Federalism Framework

1. Introduction: Cases Before and After *Lopez*

Only two courts have held that the Access Act is unconstitutional.¹⁸⁴ Five lower courts have upheld the Access Act under the Commerce Clause, but these cases were decided before the Court's decision in *Lopez*.¹⁸⁵ Five other courts, however, have sustained the Access Act against Commerce Clause challenges in light of *Lopez*.¹⁸⁶ In the next three sections, this Note analyzes and critiques the reasoning that different courts have engaged in to deter-

("Admittedly, a determination whether an interstate activity is *commercial* or *noncommercial* may in some cases result in legal uncertainty.") (emphasis added); *id.* at 1638 (Kennedy, J., concurring) ("[W]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of *commercial activities*, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.") (emphasis added); *id.* at 1640 (Kennedy, J., concurring) ("As the Chief Justice explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a *commercial character*, and neither the purposes nor the design of the statute have an evident *commercial nexus*.") (emphasis added).

182. *Id.* at 1630-31.

183. *But cf.* McJohn, *supra* note 146, at 3-4 (arguing that while the rhetoric of *Lopez* suggests substantive limits on Congress, "its effect is likely to be more consistent with the procedural conception of federalism").

184. *See Hoffman v. Hunt*, 923 F. Supp. 791 (W.D.N.C. 1996); *United States v. Wilson*, 880 F. Supp. 621 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995).

185. *See American Life League, Inc. v. United States*, 855 F. Supp. 137 (E.D. Va. 1994), *aff'd* 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995); *Riely v. Reno*, 860 F. Supp. 693 (D. Ariz. 1994); *United States v. Hill*, 893 F. Supp. 1034 (N.D. Fla. 1994); *Cook v. Reno*, 859 F. Supp. 1008 (W.D. La. 1994); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994).

186. *See United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995); *Cheffner v. Reno*, 55 F.3d 1517 (11th Cir. 1995); *United States v. Scott*, 919 F. Supp. 76 (D. Conn. 1996); *United States v. Lucero*, 895 F. Supp. 1421 (D. Kan. 1995); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995).

mine if the Access Act is a constitutional exercise of the commerce power and explains how such reasoning corresponds to the two conceptions of federalism drawn from *Lopez*. The analysis is conducted on three lines: (1) pre-*Lopez* cases which have upheld the Access Act; (2) a sole pre-*Lopez* case that invalidated the Access Act; and (3) the post-*Lopez* treatment of the Access Act.

2. Pre-*Lopez* Analysis

a. *Riely v. Reno*—A Representative Case

*Riely v. Reno*¹⁸⁷ is representative of the analysis that pre-*Lopez* courts engaged in to uphold the Access Act. In some respects, *Riely* and *Lopez* are similar. However, *Lopez* alters the Commerce Clause analysis found in *Riely* in a significant manner. To understand *Riely*, it is important to note that while *Riely* was decided before the Supreme Court's decision in *Lopez*, it was decided *after* the Fifth Circuit's *Lopez* decision.¹⁸⁸ The Fifth Circuit in *Lopez* had argued that "[n]either the act itself nor its legislative history reflect any Congressional determination that the possession denounced by 922(q) is in any way related to interstate commerce or its regulation, or, indeed, that Congress was exercising its power under the Commerce Clause."¹⁸⁹ The Fifth Circuit found it determinative that Congress did not make adequate findings, but left it open as to whether Congress might be able to support the regulation in the future if it did make such findings.¹⁹⁰ Thus, the Fifth Circuit relied on the procedural conception of federalism and held that Congress failed to meet the minimal findings requirement.

The *Riely* court distinguished the Fifth Circuit *Lopez* decision by arguing that, with the Access Act, Congress had not only declared that it was exercising its power pursuant to the Commerce Clause but it had also made "findings that the activities proscribed by [the Access Act] affect interstate commerce."¹⁹¹ However, the

187. 860 F. Supp. 693 (D. Ariz. 1994).

188. 2 F.3d 1342 (5th Cir. 1993), *aff'd*, *United States v. Lopez*, 115 S. Ct. 1624 (1995).

189. *Id.* at 1366. The Fifth Circuit affirmed that there are constitutional limits on commerce power and that Congress may not use a "trivial impact" on intrastate commerce as a justification for regulating local activities since "the chain of causation is virtually indefinite, and hence there is no private activity, no matter how local and insignificant, the ripple effect from which is not in some theoretical measure ultimately felt beyond the borders of the state in which it took place." *Id.* at 1362.

190. *See id.* at 1368.

191. *Riely*, 860 F. Supp. at 707. The inclusion of both a declaration and findings direct-

district court in *Riely* went further and argued that Congress is not even required to make express findings to show that an activity affects interstate commerce.¹⁹² In this respect, *Riely*'s reasoning corresponds more with the Supreme Court in *Lopez* where the Court argued that Congress "normally" need not make particularized findings.¹⁹³

Still, there are several differences between *Riely* and the Supreme Court's decision in *Lopez*—both procedural and substantive differences. First, unlike *Riely*, the Court in *Lopez* did *not* consider it sufficient that a rational relationship existed between firearm possession near schools and interstate commerce. This is conspicuous given that Justice Breyer, in dissent, provided considerable evidentiary support for an empirical link between the possession of a firearm in a school zone and its deleterious effect on interstate commerce.¹⁹⁴ Under the Court's prior cases, the Gun-Free School Zones Act should have survived rational review, as the dissenters pointed out.¹⁹⁵ Thus, it is possible that the Court in *Lopez* was

ly distinguishes the *Riely* court's Access Act analysis from the Fifth Circuit's Gun-Free School Zones Act analysis. The Fifth Circuit found that there was not merely a lack of a declaration and findings, formal or informal, but the legislative history itself did not show that Congress was invoking the Commerce Clause. See *Lopez*, 2 F.3d at 1363-64. On the other hand, as the Fifth Circuit itself acknowledged, Congress need not recite what power it decides to exercise in order to support a regulation's constitutionality. See *id.*; see also *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

192. See *Riely*, 860 F. Supp. at 707 (citing *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993)).

193. See *Lopez*, 115 S. Ct. at 1631 (citing *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *United States v. Perez*, 402 U.S. 146, 156 (1971)).

194. See *id.* at 1665-70 (Breyer, J., dissenting). Justice Breyer's accumulated findings show that the Court *could* articulate a conclusion for Congress that guns near schools affect interstate commerce and that Congress "could have had 'a rational basis' for so concluding." *Id.* at 1658 (emphasis omitted). Interestingly, however, if Justice Breyer thought that it was sufficient if Congress *could* have had a rational basis for its conclusion, then it was unnecessary for him to add an appendix several pages long, containing an avalanche of information taken from several journals, magazines, and congressional reports, substantiating that conclusion. He could have just *presumed* that, in the judgment of Congress, there was a substantial effect on interstate commerce.

195. See *Lopez*, 115 S. Ct. at 1651 (Stevens, J., dissenting); *id.* at 1652 (Souter, J., dissenting); *id.* at 1657 (Breyer, J., dissenting). As such, it is possible to conjecture that the Court was moving toward heightened procedural requirements for Congress—perhaps signaling a "toughened rational review" in Commerce Clause cases. Professor Deborah Jones Merritt, for example, suggests that from the general tenor of the majority opinion in *Lopez*, taken together with the statements of the O'Connor and Kennedy concurrence, the Court will scrutinize Commerce Clause challenges under a "toughened" rational basis standard, or a rational basis with "bite." See Merritt, *supra* note 158, at 684. Even Justice Souter in dissent stressed that the level of deference suggested by the majority would be subject to "gradation according to the commercial or noncommercial nature of the immedi-

signalling that Congress needs to satisfy the requirement of legislative findings before it can regulate certain activities where the connection to interstate commerce is not immediately apparent. Indeed, while Rehnquist argued that findings are not normally needed,¹⁹⁶ he did add that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."¹⁹⁷ This would thus accord with the procedural conception of federalism and would account for differences between *Riely* and *Lopez*.

Secondly, and alternatively, the difference between *Riely* and *Lopez* may turn on a substantive feature—that is, on the standard each employed. Unlike the court in *Riely*, which held that a court must defer if a "regulated activity *affects* interstate commerce,"¹⁹⁸ the Supreme Court held that a court must defer if a regulated activity "*substantially affects*" interstate commerce.¹⁹⁹ In fact, Rehnquist in *Lopez* went out of his way to emphasize that the "substantial effects" test is the proper standard to apply in Commerce Clause cases,²⁰⁰ suggesting that the Court considers there to be a legally significant difference between the two standards. Thus, one is tempted to say that under *Lopez*, if an activity does

ate subject of the challenged regulation." *Lopez*, 115 S. Ct. at 1653 (Souter, J., dissenting). On the other hand, if the Court *were* applying a toughened rational review in *Lopez*, it did not announce its new standard explicitly. If the Court did, indeed, give less deference to Congress in *Lopez*, its approach then was more similar to the approach taken in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), where the Court purported to apply rational review but instead substituted a "second-order rationality inquiry." See Frickey, *supra* note 125, at 728.

196. See *Lopez*, 115 S. Ct. at 1631.

197. *Id.* at 1632 (footnote omitted). Actually, Chief Justice Rehnquist's *Lopez* opinion may be consistent with his earlier statement that "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., dissenting). However, as the Fifth Circuit in *Lopez* observed about the rational basis test, no Supreme Court in the last 50 years has set aside findings of Congress, formal or informal, claiming that a regulated activity substantially affects interstate commerce. See *Lopez*, 2 F.3d at 1363 n.43. This is not surprising given the extreme deference that courts give to Congress under rational basis review. At the same time, however, "the Court has never renounced responsibility to invalidate legislation as beyond the scope of the Commerce Clause." *Id.*

198. *Riely v. Reno*, 860 F. Supp. 693, 707 (D. Ariz. 1994) (citing *Hodel*, 452 U.S. at 276) (emphasis added).

199. See *Lopez*, 115 S. Ct. at 1630 (emphasis added).

200. See *id.* at 1630.

not *substantially* affect interstate commerce, Congress is barred from regulating it. This would hold true, however, if it were not for the aggregation principle.²⁰¹ As the next section explains, the substantial effects standard may, unfortunately, be no more than a mere linguistic formula—one with a closer relation to the procedural conception of federalism than to the substantive conception. If this is true, then the difference between *Riely* and *Lopez* may be a difference in degree rather than a difference in kind.

b. Aggregation—Transforming Substantive
Constraint into Procedural Formality

The difference between the mere “affects” formulation and the “substantial effect” standard may be legally cognizable, as *Lopez* seems to suggest, but the difference becomes chimerical in practice. This is implied by the Fifth Circuit’s observation in *Lopez* “that the imprecise and matter of degree nature of concepts such as ‘substantially,’ especially as applied to effect on interstate commerce, generally renders decision making in this area peculiarly within the province of Congress, rather than the Courts.”²⁰² The operation of the aggregation principle, however, virtually stultifies the purported difference and renders limits under the Commerce Clause illusory.

As noted, Congress marshaled extensive findings to support the Access Act.²⁰³ It is very likely that these findings satisfy the “substantial effect” test from *Lopez*. However, if Congress were only able to muster a single trivial finding to support the Access Act, then theoretically, Congress would not have satisfied the substantial

201. See *supra* notes 96-98.

202. *United States v. Lopez*, 2 F.3d 1342, 1362 (5th Cir. 1993), *aff’d*, *United States v. Lopez*, 115 S. Ct. 1624 (1995).

203. For example, the court in *Riely* recited extensive findings made by the Committee on Labor and Human Resources dealing with how clinics and abortion services providers are directly and indirectly involved in interstate commerce and operate within the stream of commerce since they often purchase medical products from other states. See *Riely*, 860 F. Supp. at 707 (reciting congressional findings in S. REP. NO. 103-117, at 31 (1993)). The court also noted that the Committee found that such abortion providers employ staff and lease office space, that many patients engage in interstate travel in order to obtain abortion services in different states, and that clinic employees occasionally travel across state lines to work. See *id.* Finally, the court noted that the Committee found that the obstructionist activities targeted by the Access Act have a “negative effect” on interstate commerce. See *id.* Blockades and sabotage had forced clinics to close and no longer provide services, which in turn led to a decrease in the interstate movement of people and goods. See *id.*

effects test.²⁰⁴ For example, Congress should not be able to use the fact that clinic employees “occasionally” travel across state lines as an excuse to regulate local acts of civil disobedience by anti-abortion protesters. The Court has declared that Congress may not rely on “a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”²⁰⁵ Unfortunately, while the effect of the local farmer’s activities in *Wickard* was also relatively “trivial,” the regulation was upheld because the Court, under the aggregation principle, presumed that the effect of such trivial activity taken together with other similar activity makes it much less trivial.²⁰⁶

The aggregation principle, in fact, has a dual nature. In addition to aggregating a significant number of actors who individually engage in a low volume of activity, as in *Wickard*, Congress can, conversely, aggregate a smaller number of actors who individually engage in a high volume of activity, as in *Perez*. Thus, for example, Congress justified the need for the passage of the Access Act

204. After all, if the substantial effects test is supposed to represent the limit on Congress’ commerce power, then by necessary implication there must be some activities that have an insubstantial effect on interstate commerce. The Seventh Circuit in *United States v. Wilson*, 73 F.3d 675,682 (7th Cir. 1995), for example, argued that “[a] mere decrease in the sale or purchase of goods or services would not qualify” as a substantial effect on interstate commerce. The Seventh Circuit cited this example as a limit on Congress’ commerce power in response to the district court which was hard-pressed to find any activity that Congress could not regulate under the Commerce Clause. See *United States v. Wilson*, 880 F. Supp. 621, 625 (E.D. Wis), *rev’d*, 73 F.3d 675 (7th Cir. 1995).

205. *Maryland v. Wirtz*, 392 U.S. 183, 196-97 n.27 (1968), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833 (1976). Actually, the Court might accept the link to interstate commerce if the employee had moved from one state to live and work in another state where the abortion clinic was operating. The fact that the employee moved in 1973, for example, might not be a barrier since the employee did, in fact, cross state lines. This is similar to how the Court has upheld convictions for felony possession of firearms on the basis that the firearm had once traveled across state lines, even if the interstate movement of the firearm occurred many years before. See *Scarborough v. United States*, 431 U.S. 563, 575 (1977). Furthermore, the nexus to interstate commerce need not even be contemporaneous with the defendant’s possession of the firearm. See *id.* at 577; see also *Barrett v. United States*, 423 U.S. 212, 213 (1976) (finding a sufficient nexus to interstate commerce when a firearm purchased by a felon from a retailer had previously been shipped through interstate commerce to the retailer). These cases underscore how attenuated the nexus to interstate commerce can be for Congress to regulate. A gun that traveled two centuries ago across state boundaries could satisfy the requisite nexus. Before *Lopez*, at least, it was not completely fanciful to speculate whether Congress could regulate an individual’s behavior simply on the grounds that the person crossed state lines at one time in his life, crossed state lines while he was in his mother’s womb, or inherited from his parents genes that had once crossed state lines!

206. See *Wickard v. Filburn*, 317 U.S. 111, 115 (1942).

because of the already limited number of abortion providers across the country and because additional closings would further limit the availability of abortion services.²⁰⁷ Congress found that abortion clinics are located in only seventeen percent of all counties in the United States,²⁰⁸ and that anti-abortion blockades and sabotage have a "negative effect" on interstate commerce.²⁰⁹ However, the

207. See *supra* note 26 and accompanying text.

208. See H.R. REP. NO. 103-306, at 8 (1993), reprinted in 1994 U.S.C.C.A.N. 699, 705.

209. See S. REP. NO. 103-117, at 31 (1993). The Senate Labor and Human Resources Committee equated "negative effect" with a reduction in the interstate movement of people and goods. See S. REP. NO. 101-117, at 31. This would be analogous to the situations in *Heart of Atlanta* and *Katzenbach*, where Congress had power to regulate motels and restaurants with discriminatory practices because such practices inhibited the interstate movement of many blacks and reduced interstate commerce. See *Heart of Atlanta v. United States*, 379 U.S. 241, 252-53 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964). However, the conference committee deleted the findings from the Senate bill and incorporated them in the purpose section. Instead, the conference said that Congress had found that the "interstate campaign of violence" against abortion services providers "burden[ed] interstate commerce by forcing patients to travel from states where their access to reproductive health services is obstructed to other states." H.R. CONF. REP. NO. 103-488, at 7, reprinted in 1994 U.S.C.C.A.N. 699, 724. However, the rationale that anti-abortion violence "burdens" commerce "by forcing patients to travel" from one state to another state seems upside down. How does anti-abortion violence burden interstate commerce if it forces individuals to travel to other states to obtain an abortion? Rather than burdening, it is *promoting* interstate commerce. If that is the rationale, then it is not analogous to *Heart of Atlanta* and the Access Act would actually be burdening interstate commerce.

One proposal for establishing substantive limits on the commerce power might be to play off this notion of "burdening" interstate commerce. The commerce power could be limited to instances where it is invoked to *promote* interstate commerce. Cirillo and Eisenhofer, for example, suggest that a judicially enforceable limit on the commerce power would be to restrict "congressional regulation of intrastate activity to instances where Congress had acted to protect the national economic health." Cirillo & Eisenhofer, *supra* note 43, at 922. This proposal finds support in the fact that one of the primary reasons for adopting the Constitution was to deal with the ruinous trade wars between the states under the Articles of Confederation. The Commerce Clause was to be used merely for regulating trade barriers between the states. See *id.* at 905; see also 2 M. FARRAND, THE RECORDS OF THE CONVENTION OF 1787, 17, 478 (1911) (discussing how Madison wrote that the Commerce Clause was intended as a "negative and preventive provision against injustice among the States themselves"). Under this view, Congress was afforded the power to regulate interstate commerce so as to promote it, owing to the fact that the states were ineffective at the task. By contrast, Congress would not have authority to deliberately pass legislation that burdened interstate commerce, especially if the burden fell more heavily on certain states.

Unfortunately, it seems perverse to strip Congress of power to regulate anti-abortion violence on the theory that it would burden interstate commerce. Instead, it would be better to burden interstate commerce than to tolerate violence against citizens seeking to exercise their federal constitutional rights. Moreover, if the commerce power is plenary, as Chief Justice Marshall stated in *Gibbons*, then Congress seemingly should be able to promote or burden interstate commerce at its discretion. Most importantly, however, while Congress would discourage the interstate movement of people (since women would no

small number of abortion clinics are not relatively minor interstate actors—they are not like Filburn and his home-grown wheat. Instead, they engage in a considerable volume of business. For example, it was reported that about 1.5 million abortions were performed in 1992.²¹⁰ Thus, the closure of even a few abortion clinics could result in a substantial decline of business, affecting both the clinics and their suppliers. In this sense, the small number of clinics are analogous to the small number of individuals or groups engaging in loanshark activities in *Perez* whose activities collectively drained large amounts of money from the economy.²¹¹

The problem, however, is that the Court will never inquire into whether there are a large number of clinics whose negligible activities, in the aggregate, have a substantial effect on interstate commerce, or whether there are only a few clinics that individually engage in a significant volume of business.²¹² To do otherwise would require the Court to invade the fact-finding province of Congress. As the Court in *Hodel v. Indiana*²¹³ stated, the appropriate inquiry under rational basis review is “not how much commerce is involved but whether Congress *could* rationally conclude that the regulated activity affects interstate commerce.”²¹⁴ Thus, the convenient marriage of the rational basis test to the aggregation principle demonstrates the futility in finding any substantive limits to the Commerce Clause.

Finally, even if the Court were to give less deference to Congress’ conclusions that an activity substantially affects interstate

longer need to travel and instead would be able to remain in their own states to get an abortion) Congress would concurrently be promoting the interstate movement of goods if more clinics remain in business and purchase medical supplies from interstate dealers. Thus, it would be nearly impossible for the Court to separate what effects a particular congressional regulation might have on interstate commerce. Such an approach to limiting the Commerce Clause would be untenable and at odds with the plenary notion of commerce power, and would draw the Court into a nightmarish fact-finding quagmire.

210. See Lynda Gotov, *Abortion Seekers Come From Many Backgrounds*, BOSTON GLOBE, Jan. 9, 1995, at 5.

211. See *United States v. Perez*, 402 U.S. 146, 147 n.1 (1971) (noting that organized crime activities involve billions of dollars per year).

212. See *supra* note 105.

213. 452 U.S. 314 (1981). *Hodel* involved a challenge to the “prime farmland” provisions of the Surface Mining Control and Reclamation Act of 1977 on the grounds that there was an insubstantial effect on interstate commerce because the appellees’ surface mining constituted only 0.006% of the country’s total prime farmland per year. See *id.* at 321.

214. *Id.* at 324 (emphasis added).

commerce, such as under a "toughened" rational basis test,²¹⁵ the aggregation principle itself "has no stopping point."²¹⁶ Even if a court held that abortion protest activities do not have a substantial effect on interstate commerce, Congress could return and enact an omnibus Access Act that prohibits other obstructive protesting of commercial entities. For example, the statute could, along with anti-abortion protests of clinics, also regulate demonstrations by environmentalist groups that disrupt the premises of oil companies as well as rallies by animal-rights advocates that block facilities conducting animal research. In doing so, Congress could encompass more activities within its regulatory sphere²¹⁷ and satisfy the substantial effects requirement.

In the end, the substantial effects test is actually a quasi-procedural requirement. True, from a substantive constraint standpoint, certain activities do not theoretically satisfy the standard. That is, not every human activity *substantially* affects interstate commerce. However, in practice, it is for Congress a mere procedural formality of widening its regulatory orbit to embrace a sufficient number of activities. As the omnibus Access Act example more than clearly demonstrates, and as Justice Thomas pointed out in his concurrence in *Lopez*, "one always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce."²¹⁸ Thus, the difference between the simple "affects" test in *Riely* and the "substantial effect" standard in *Lopez* is illusory and hence useless as a substantive limitation on the commerce power. This is not to say, however, that no courts have attempted to fashion substantive limits to the Commerce Clause. In fact, even one pre-*Lopez* case took up the challenge.

215. See *supra* note 195.

216. See *Lopez*, 115 S. Ct. at 1650 (Thomas, J., concurring).

217. Cf. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In *Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 802 (1995) (arguing that while the precise line where interstate commerce ends is unclear, "[a]ny first-year law student can show by cumulating individually insignificant effects that any given congressional regulation of commerce rationally might be based on the belief that a state activity was generating significant external effects on other states and thus on interstate commerce").

218. *Lopez*, 115 S. Ct. at 1650 (Thomas, J., concurring).

3. *Wilson*'s Attempt at Articulating a Limit

Despite the hostility toward substantive limits under the Court's Commerce Clause jurisprudence, the district court in *United States v. Wilson*²¹⁹ still found the Access Act unconstitutional.²²⁰ However, *Wilson* is only one of two decisions holding that Congress has exceeded its authority under the Commerce Clause by enacting the Access Act.²²¹ Moreover, the reasoning in *Wilson* was not persuasive on appeal to the Seventh Circuit where the district court's decision was reversed even after *Lopez*.²²²

In striking down the Access Act, the district court in *Wilson* adhered to the modern, and deferential, rule under *Hodel* and admitted that Congress' power under that body of case law was "extensive."²²³ Yet the district court also emphasized that there were constitutionally mandated limits to Congress' power under the Commerce Clause. The district court also cited *Hodel* for the proposition that "[i]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be in Commerce."²²⁴ The court emphasized that the commerce power is an enumerated power and that because the exercise of that power had rarely been struck down under the rational basis test, it was "difficult for lower courts to perceive any articulable limits."²²⁵ Nevertheless, because the commerce power

219. 880 F. Supp. 621 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995).

220. The district court ultimately concluded that the Access Act had transgressed the outer limit of the Commerce Clause that the Court had consistently reaffirmed existed. *See id.* at 624-25; *see also* NLRB v. Jones & Laughlin, 301 U.S. 1, 37 (1937) (Commerce Clause cannot be extended so as to obliterate the distinction between local and national); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310-11 (1981) (Rehnquist, J., concurring) (it is "a mistake to conclude that [the commerce power] is unlimited").

221. Interestingly, the district court's opinion in *Wilson* is a pre-*Lopez* decision and reveals how lower court judges had become uncomfortable with the incessant advance toward federalization even before *Lopez* articulated this concern. The Access Act is not the only recent federal statute to be declared unconstitutional under the Commerce Clause. *See also* *United States v. Cortner*, 834 F. Supp. 242, 242 (M.D. Tenn. 1993), *rev'd sub nom.* *United States v. Osteen*, 30 F.3d 135 (6th Cir. 1994) (striking down Anti-Car Theft Act of 1992, 18 U.S.C. § 2119); *United States v. Massari*, 894 F. Supp. 1360 (D. Ariz. 1995) (striking down Child Support Recovery Act of 1992) *rev'd, remanded* 95 F.3d 787 (9th Cir. 1996).

222. *See Wilson*, 73 F.3d at 675.

223. *See Wilson*, 880 F. Supp. at 624.

224. *Id.* at 625 (emphasis omitted).

225. *Id.* at 624.

is "only one of several defined and enumerated powers," it cannot be unlimited.²²⁶ The district court thus relied on the principle that Congress' power is plenary, but only within its sphere. The difficult issue was to determine the outer limits of the sphere.²²⁷

In its effort to articulate limits on the commerce power, the district court focused on the rational basis test. The court focused on the meaning of "rational" and argued that "it cannot mean the Court will defer to Congress only if it acts upon the 'most rational' basis available to it."²²⁸ The court conceded that the wisdom of public policy is rarely a concern of federal courts.²²⁹ On the other hand, federal courts are not to defer to Congress "simply because it [acts] in a purely 'logical' sense," as "there may always be a plausible rationale for Congressional action that meets the requirements of simple logic."²³⁰ This is not enough because "in a logical sense, all activity 'affects' commerce because 'there is no private activity, no matter how local and insignificant, the ripple affect from which is not on some theoretical measure ultimately felt beyond the border of the state in which it took place.'"²³¹

In its rational basis analysis, the district court then asked: "Does the logic of the Congressional findings made with respect to the non-violent physical obstruction of reproductive health services clinics provide a basis for federal regulation of any human activity?"²³² The court would not accept a rationale that would give Congress regulatory power over every human activity.²³³ Thus,

226. *Id.* at 625.

227. *See id.*

228. *Wilson*, 880 F. Supp. at 625.

229. *See id.*

230. *Id.*

231. *Id.* (citing *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993)). The district court's reliance on the Fifth Circuit's analogy in *Lopez* is illustrative. The "ripple effect" analogy is powerful because it allows us to imagine the smallest disturbance in a perfectly still pool of water growing to disturb the entire pool.

232. *Id.* at 630.

233. *Wilson*, 880 F. Supp. at 632. The Supreme Court employed a similar approach in *Lopez*, arguing that "if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 115 S. Ct. at 1632. The majority seemed to be wary "of regulatory rationales that would encompass all forms of human behavior." Merritt, *supra* note 158 at 712. Professor H. Jefferson Powell calls this a "test of consequences." This is an implied approach in *Lopez* and "suggests that it is not enough to make the positive argument that a given statute has a substantial relationship to interstate commerce; it is also necessary to make the essentially negative demonstration that one can with logical consistency prove some other, hypothetical statute unconstitutional." Powell, *supra* note 146, at 656.

having reformulated the meaning of “rational” under the rational basis test, the district court in *Wilson* was then prepared to deal with the “four basic findings” amassed by Congress to support the Access Act.

a. Four Basic Congressional Findings to
Support the Access Act

The district court first reviewed Congress’ finding that “abortion clinics operate within the stream of commerce because they purchase supplies, employ staff, own and lease office space and generate income.”²³⁴ As expected, the court found this rationale unsatisfactory because all persons and entities operate, in theory, within the stream of interstate commerce.²³⁵ Based on such reasoning, the commerce power would know no limits because the logic of such a finding provides a basis for federalizing all spheres of human activity.²³⁶

Congress’ second finding, that some individuals travel across state lines in order to provide or obtain services, was similarly disposed of by the district court because it “[did] not distinguish abortion from any other human activity.”²³⁷ Once again, permitting Congress to rely on this rationale would extend the commerce power “to any sphere of human activity.”²³⁸

Congress’ third finding was that abortion protesters obstruct access to clinics and that the inability to obtain an abortion has a negative effect on interstate commerce. As with the other two findings, the court found that the logic of this rationale would afford Congress “the power to regulate any non-commercial intrastate activity that . . . negatively affects a commercial entity oper-

234. *Wilson*, 880 F. Supp. at 630.

235. *See id.*

236. The court added that “[a]ll Americans enter the stream of commerce through the purchase of goods, however minimal those purchases may be.” *Id.* If Congress were permitted to rely on the stream of commerce rationale, “no one [would be] immune from federal regulation under the Commerce power.” *Id.*

237. *Id.*

238. *Id.* at 631. The same considerations may also have driven *Lopez*. Professor Merritt suggests that one of the motivations in *Lopez* was the “majority’s wariness of regulatory rationales that would encompass all forms of human behavior.” Merritt, *supra* note 158, at 712. Indeed, Rehnquist in *Lopez* said that “if we were to accept the Government’s arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.” *Lopez*, 115 S. Ct. at 1632. Rehnquist was also critical of the dissent which was “unable to identify any activity that States may regulate but Congress may not.” *Id.*

ating within the stream of commerce."²³⁹ The court argued such a rationale would allow Congress to regulate shoplifting because it reduces the supply of goods, to regulate dieting because it reduces the demand for certain food, or to regulate breast-feeding because it reduces the demand for formula.²⁴⁰

Finally, the court rejected Congress' finding that the problem of abortion protesting and violence is nationwide in scope and beyond the control of the states. The court argued that simply because a problem is national in scope, or is one that is beyond the ability of the states to control, does not give Congress the power to regulate it unless it also "substantially affect[s] interstate commerce."²⁴¹ The court argued that as an alternative to relying on the commerce power to deal with law enforcement emergencies of the states, such emergencies can be dealt with under 42 U.S.C. § 10501, which authorizes the Attorney General to make available federal law enforcement resources to the states.²⁴²

The Seventh Circuit in *Wilson* was persuaded only by the last argument of the district court, which provided that the substantial effects test is not satisfied if Congress merely attempts to regulate a problem that is nationwide in scope like the obstruction of reproductive health facilities.²⁴³ Yet the Seventh Circuit did consider this fourth finding of Congress as further confirmation that Congress was attempting "to address a truly interstate problem by enacting the Access Act."²⁴⁴ As to the first three findings, the Seventh Circuit found that the district court had failed to properly apply the substantial effects test.²⁴⁵ The Seventh Circuit suggested, for example, that "it is plainly rational that reproductive health

239. *Wilson*, 880 F. Supp. at 631.

240. *See id.* at 631 n.17.

241. *Id.* at 631.

242. *See id.*

243. *See United States v. Wilson*, 73 F.3d 675, 683 (7th Cir. 1995).

244. *Id.*

245. *See id.* at 681-82. Ironically, the application of the substantial effects test by the district court in *Wilson* is not too far removed from the Court's application in *Lopez*. The district court focused more on the implications of upholding the Access Act for Congress's commerce power than the effects of abortion protests on interstate commerce. *See Wilson*, 880 F. Supp. at 630. Similarly, the Court in *Lopez* "never directly addressed the arguments that gun possession in school zones could substantially affect interstate commerce. Rather, it considered instead the implications of accepting [the government's arguments in support of the statute]." McJohn, *supra* note 146, at 28-29 (footnotes and emphasis omitted).

facilities are engaged in interstate commerce and that obstruction of such facilities brings the commerce to a halt."²⁴⁶

Further, the Seventh Circuit was unpersuaded by the district court's view that the rationales proffered by Congress would allow it to regulate virtually any activity. Instead, it maintained that the substantial effects requirement represents the limit to congressional power under the Commerce Clause.²⁴⁷ Thus, for example, where the district court argued that Congress might be able to regulate shoplifting because such activity reduces the supply of goods,²⁴⁸ the Seventh Circuit argued that Congress had a "probable lack of authority to regulate [such activities]."²⁴⁹ The Seventh Circuit found that the district court erred by assuming that congressional findings would automatically validate the Access Act under the rational basis test. Instead, the rational basis test "requires courts to defer to Congress on a case-by-case basis when Congress' findings reveal a *substantial* relation to interstate commerce."²⁵⁰

This assumes, of course, that the substantial effects test can function as an effective limit on Congress under rational basis review.²⁵¹ Yet, it is not clear whether a federal shoplifting statute would survive the rational basis test. After all, Congress could rationally conclude that shoplifting, like abortion protesting, results in a commensurate decline in the supply of goods. Moreover, while the Seventh Circuit admonished the district court for its conclusion that Congress possesses virtually unlimited authority to regulate under the substantial effects test, the Seventh Circuit's own conclusion is belied by the fact that the aggregation principle allows Congress to aggregate a sufficient number of activities in one regulatory sphere to satisfy the substantial effects test, as the previous section explained.²⁵² For example, in drafting a federal statute, Congress could simply aggregate shoplifting activities with other forms of theft that injure interstate businesses. This would satisfy the substantial effects test because, as Justice Thomas makes plain in *Lopez*, "[e]ven though particular sections [of the statute]

246. *Wilson*, 73 F.3d at 681.

247. *See id.*

248. *See Wilson*, 880 F. Supp. at 631 n.17.

249. *Wilson*, 73 F.3d at 682. The Seventh Circuit argued that "[a] mere decrease in the sale or purchase of goods or services would not qualify" as a substantial effect on interstate commerce. *Id.*

250. *See id.* at 682 n.7.

251. *See supra* notes 202-18 and accompanying text.

252. *See supra* notes 205-18 and accompanying text.

may govern only trivial activities, [as shoplifting might be], the statute in the aggregate regulates matters that substantially affect commerce."²⁵³ Ironically, the Seventh Circuit's suggestion that Congress lacks the authority to enact such a statute plunges it into the same non-deferential mode of review that it criticized the district court for engaging in and which the Seventh Circuit itself had described as "seriously flawed."²⁵⁴

In the end, though, the Seventh Circuit correctly held that the district court did not simply alter the rational basis test but completely reworked it.²⁵⁵ The district court had argued that "[i]n order for Congress to justify its regulation of purely local, non-violent, non-commercial activity, there must be a connection between the activity and interstate commerce that is 'rational' both as a matter of simple logic and within the context of the Constitution and the structural limitation created therein."²⁵⁶ Unfortunately, the district court's searching inquiry is incompatible with the rational basis test, and actually transforms its review into heightened scrutiny.²⁵⁷

Nevertheless, the district court should be commended for recognizing that rational review, without more, leads to irrational results under a system of enumerated powers. The district court's opinion effectively highlights how Congress has used the Commerce Clause to regulate spheres of activity traditionally thought to be the prerogatives of the states—such as states' control over local criminal activity.²⁵⁸ The court's opinion also reflects how the balance be-

253. *Lopez*, 115 S. Ct. at 1650 (Thomas, J., concurring). In fact, Congress could also pass a simple statute without aggregating other forms of theft. Shoplifting activities in fifty states no doubt could have a substantial effect on interstate commerce. At a minimum, Congress could have a rational basis for so concluding.

254. See *Wilson*, 73 F.3d at 682 n.7.

255. See *id.*

256. *Wilson*, 880 F. Supp. at 626 (emphasis omitted).

257. See *United States v. White*, 893 F. Supp. 1442, 1434 (C.D. Cal. 1995).

258. The Supreme Court has stated that when Congress criminalizes conduct already subject to state criminal jurisdiction, it "effect[s] a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Enmons*, 410 U.S. 396 (1973). Yet the issue cannot simply be framed in terms of whether an activity has "traditionally" been thought to belong to the states. Instead, the issue is whether there is an inherent limit to the Commerce Clause because it is an enumerated power and thus leaves certain spheres exclusively to the states. Even the Tenth Amendment may have a role. The district court in *Wilson* drew upon the Tenth Amendment and argued that the closer a Commerce Clause regulation "falls within the ordinary course of local affairs and touches the ordinary course of people's lives and properties, such as the [Access Act's] regulation of non-violent trespass, the stronger the confirmation by the Tenth Amendment

tween the federal and state governments has become so skewed that it is virtually impossible to square today's Commerce Clause jurisprudence with Justice Marshall's admonition in *Gibbons* that the Commerce Clause is "limited to specified objects."²⁵⁹ A closer analysis of the district court's treatment of Commerce Clause precedent may help verify the proposition that the commerce power has grown into a virtually unlimited enumerated power and is no longer limited to specific objects.

that Congress has exceeded the scope of its enumerated power and is 'subject to limits.'" *Wilson*, 880 F. Supp. at 634.

259. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824). It can be argued that Marshall's construction of the Commerce Clause has remained static, and that it is the nature of the economy that has changed. That is, as Justice O'Connor observed in *New York*, "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." *New York v. United States*, 505 U.S. 144, 158 (1992). It can no doubt be conceded that Congress' power under the Commerce Clause has been influenced by the growth of a highly integrated economy.

The district court in *Wilson* also raised the "growth of the economy" argument as a source of authority for federal regulation, but it noted the "obvious tension" with that concept and the concept of enumerated powers. *Wilson*, 880 F. Supp. at 632 n.19. The court found difficulty in the fact that "as it is more fully understood and accepted that all human activity has [commercial ramifications], Congress increasingly relies upon this abstract principle to offer boilerplate commercial rationales to regulate purely local activities for the purpose of achieving purely social objectives." *Id.* Of course, congressional authority is not limited solely to economic objectives. It has clearly been established that Congress can invoke the Commerce Clause for social, as well as economic reasons. *See supra* notes 99-103 and accompanying text. A better argument is that "[t]here has been no basic transformation in the economy that requires, or allows, a parallel transformation in the scope of the commerce clause." Epstein, *supra* note 62, at 1397. This argument acknowledges that the states have always been affected by economies in other states and that national economic policies have always influenced a state's economic well-being. *See id.* at 1396. Thus, it is the conception of the Commerce Clause, and Congress' power thereunder that has changed, rather than the basic economic framework. Certain activities in 1824, such as activities regulated by inspection laws, admittedly influenced commerce "considerably," as Chief Justice Marshall said in *Gibbons*, and yet were deemed prerogatives of the states since they did not yet enter interstate commerce. *Gibbons*, 22 U.S. (9 Wheat.) at 203. Most importantly, can it really be admitted that the Framers were so short of foresight that they did not envision the growth of an integrated national economy that would connect the entire country? Did they truly expect that their carefully crafted system of government grounded on the doctrine of enumerated powers would know fewer and fewer limits as the economy grew? If they expected it, then why did they not just fashion a system of government that had unlimited, rather than enumerated, powers? *See supra* note 43.

b. No Longer Limited to Specified Objects

The concept of an unlimited enumerated power, as the commerce power may be today, is fundamentally inconsistent with our constitutional tradition of limited government. Reaching such an extreme, however, has required courts to endorse further and further extensions of precedent at the behest of Congress. *Wilson* is merely exemplary of how some federal courts have become uncomfortable with this seemingly endless extension of congressional power and have sought to draw limits. For example, the district court refused to sustain the Access Act under the *Heart of Atlanta* and *Katzenbach* line of cases because that line involves the regulation of commercial entities, whereas the Access Act involves the regulation of private, non-commercial conduct that affects commercial entities that receive goods that travel in interstate commerce.²⁶⁰ Despite this distinction between the Access Act and *Heart of Atlanta*, the Seventh Circuit reversed the district court, arguing that the Access Act *does* "regulate a commercial activity—the provision of reproductive health services."²⁶¹ It held that "[t]he Access Act regulates this commercial activity by preventing its obstruction."²⁶² However, the majority's reasoning is flawed. It plainly mischaracterizes the object of the Access Act, as the district court in *Wilson*²⁶³ and the dissenting judge on the Seventh Circuit appeal²⁶⁴ had argued.

How does the Access Act regulate commercial activity by preventing its obstruction? It does not do so by imposing any obligations on reproductive health facilities. Rather, the Act regulates abortion protesters who, in turn, affect such facilities. Even the district court conceded that Congress could regulate the clinics themselves.²⁶⁵ However, unlike the Seventh Circuit, it found that

260. See *Wilson*, 880 F. Supp. at 628.

261. *Wilson*, 73 F.3d at 683

262. *Id.*

263. The district court judge argued that the Access Act "does not regulate commercial entities, but rather . . . private conduct affecting commercial entities which in turn receive goods that have traveled in interstate commerce." *Wilson*, 880 F. Supp. at 628.

264. The dissent in *Wilson* argued that "[a] fundamental problem with the majority's analysis is that it confuses and misrepresents the regulatory thrust of the statute" because the Access Act applies to abortion *demonstrators*—a "purely noncommercial activity." *Wilson*, 73 F.3d at 692 (Coffey, J., dissenting).

265. See *Wilson*, 880 F. Supp. at 628.

Congress instead “chose to regulate conduct *one step* removed from the commercial enterprise.”²⁶⁶

Surprisingly, though, even the district court underestimated the true state of affairs. The Access Act, in fact, is actually *two steps* removed from the *Heart of Atlanta* line of cases. The Supreme Court took the first step in 1995 when it upheld congressional regulation in *Allied-Bruce Terminix Companies v. Dobson*.²⁶⁷ The *Terminix* case involved a commercial contract between a single Alabama homeowner and a local franchise of Terminix International Company—a termite control company that operated in several states and received supplies from out-of-state.²⁶⁸ The homeowner brought suit against the company which then moved to compel arbitration pursuant to the Federal Arbitration Act.²⁶⁹ In upholding the Act’s application to the homeowner, the Court allowed Congress not only to regulate the employees or employers of commercial entities, such as the hotel and restaurant operators in *Heart of Atlanta* and *Katzenbach*, but also its *customers* as well.²⁷⁰ Thus, the regulations of the Access Act are two steps removed from the commercial enterprise. They do not regulate the commercial entities (clinics) themselves or their employees, nor the customers (patients) of such entities. Instead they regulate those who would obstruct the customers or employees of such entities. The analogue in *Heart of Atlanta* and *Katzenbach* would be for Congress not to regulate the motel or restaurant operators or employees, nor the patrons of such establishments, but instead the racists who intimidate and threaten the use of violence against employees or individuals who have patronized the motels or restaurants.²⁷¹

266. *Wilson*, 880 F. Supp. at 628 (emphasis added). But see *United States v. White*, 893 F. Supp. 1423, 1434 (C.D. Cal. 1995) (arguing that the *Wilson* district court’s conclusion that the Access Act was without precedential support because Congress’ chosen method was one step removed “ignored Congress’ ‘institutional competence’ in selecting appropriate means to address a problem it had found to be national in scope and effect”).

267. 115 S. Ct. 834 (1995).

268. See *id.* at 837.

269. 9 U.S.C. § 2 (1994).

270. See *Merritt*, *supra* note 158, at 734 (noting that federal power over a customer was approved).

271. At least the regulation in *Terminix* was immediately associated with a commercial transaction—a termite contract. With the Access Act, by contrast, Congress has reached even activities that are potentially distant in time and place from the abortion clinics. The prohibitions in the Access Act apply to a person who threatens the use of force against a woman or a doctor in their home because such persons have obtained or provide reproductive health services. See *Tribe*, *supra* note 22, at 294. In fact, some critics have pointed out that the Access Act could plausibly be applied to a pastor, for example, “whose

Clearly, Congress has broken new Commerce Clause ground with the Access Act. It would therefore require an extension of precedent to sustain the Access Act under the *Heart of Atlanta* line of cases. However, as the district court properly recognized, there are several other lines of authority that Congress can seize upon to justify the Access Act. For instance, the Supreme Court has approved the federal regulation of private conduct that interferes with businesses in interstate commerce by upholding the Hobbs Act.²⁷² The Hobbs Act provides for the punishment of anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion."²⁷³ By upholding the Hobbs Act, the Court provided Congress with significant precedential value to justify the Access Act because abortion protesters clearly can have the effect of delaying and obstructing interstate commerce.²⁷⁴

sermon advocates peaceful blocking of access to an abortion clinic, because the message might intimidate someone who is thinking about going to the clinic." Steven T. McFarland, *Pro-Lifers' New Legal Nightmare: Federal Freedom of Access to Clinic Entrances Law*; FACE, CHRISTIANITY TODAY, Aug. 15, 1994.

272. 18 U.S.C. § 1951(a) (1994). The Hobbs Act was first upheld by the Court in *United States v. Green*, 350 U.S. 415 (1956).

273. § 1951(a). Two lower courts have upheld the Hobbs Act following *Lopez*. See *United States v. Stillo*, 57 F.3d 553, 558 n.2 (7th Cir.) (holding the Hobbs Act constitutional in light of *Lopez* because unlike the school gun ban, it is aimed at an economic activity (extortion) and contains an express jurisdictional element), *cert. denied*, 116 S. Ct. 383 (1995); *United States v. Arena*, 894 F. Supp. 580, 584 (N.D.N.Y. 1995) (holding defendant's reliance on *Lopez* as misplaced because unlike the Gun-Free School Zones Act, the Hobbs Act requires a connection to interstate commerce).

Some courts have held that, under the Hobbs Act, the government need only show that robbery or extortion has a "de minimis" effect on interstate commerce. See, e.g., *United States v. Collins*, 40 F.3d 95 (5th Cir. 1994). Of course, *Collins* was a pre-*Lopez* decision. At the same time, however, the Fifth Circuit in *Collins* found an insufficiently direct effect on interstate commerce from the robbery of a homeowner's cash, jewelry, clothes, and car with cellular phone. The Fifth Circuit held that finding an effect on interstate commerce from the robbery of an individual who was an employee of an interstate business would render the Hobbs Act "ubiquitous, and any robbery, in our closely-interwoven economy, arguably would affect interstate commerce." *Id.* at 100. The Fifth Circuit seemed to distinguish between robberies affecting businesses in interstate commerce and robberies affecting individuals employed by those businesses—a "distinction [that] evokes the Supreme Court's separation of commercial and noncommercial activities in *Lopez*." Merritt, *supra* note 158, at 716. The Fifth Circuit's distinction is instructive because empirically, the robbery of the individual's items most likely had some effect on interstate commerce. As the government argued in *Collins*, the robbery prevented the victim from attending a business meeting and precluded him from using his cellular phone for business calls. See *Collins*, 40 F.3d at 99.

274. See Merritt, *supra* note 158, at 725 (noting that there is a strong connection between reproductive health services and interstate commerce).

The district court in *Wilson* was far less successful in distinguishing the Hobbs Act than it was in distinguishing *Heart of Atlanta* and *Katzenbach*. This is not surprising given the breadth of this line of Commerce Clause authority. Nevertheless, the district court in *Wilson* sought to distinguish such cases as *Stirone v. United States*,²⁷⁵ in which the Hobbs Act had been applied, as well as such cases as *Russell v. United States*,²⁷⁶ in which Title XI of the Organized Crime Control Act of 1970 had been applied.²⁷⁷ The district court found that statutes in cases like *Russell* and *Stirone* had been upheld by the Court because Congress sought to regulate "activities that employ violent means to achieve an economic purpose."²⁷⁸ By contrast, the activities targeted by the Access Act involve non-violent physical obstructions of abortion clinics that do "not employ violent means to achieve an economic purpose; rather, [they] employ[] non-violent means to achieve a purely political or social purpose."²⁷⁹ Unfortunately, as the next section shows, the district court's analysis in *Wilson* is unpersuasive and misinterprets both the economic goals of abortion protesters as well as congressional authority to regulate conduct that affects interstate commerce. The next section also shows where this analysis can be strengthened to attack the constitutionality of the Access Act.

c. Abortion Protesters as Economic Activity

The district court in *Wilson* argued that the Access Act was invalid because it sought to regulate individuals who act not with an economic purpose, but rather out of a political or social motivation.²⁸⁰ Similarly, the dissent in the Seventh Circuit decision said it was "at a loss to comprehend how the protesters, who were taking part in a local act of civil disobedience, can be classified as having engaged in commercial activity."²⁸¹ The dissent argued that the protesters had "no economic end in view."²⁸²

275. 361 U.S. 212 (1960).

276. 471 U.S. 858 (1985). See *supra* note 163.

277. 18 U.S.C. § 844(i) (1994). The statute punishes anyone who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." § 844(i).

278. *Wilson*, 880 F. Supp. at 629.

279. *Id.*

280. See *Wilson*, 880 F. Supp. at 629.

281. *Wilson*, 73 F.3d at 692-93 (Coffey, J., dissenting) (emphasis omitted).

282. *Id.* at 693.

However, it is not altogether clear that non-violent abortion demonstrators who obstruct abortion clinics do not have an economic purpose in mind.²⁸³ In seeking to shut down an abortion clinic, individuals may be acting on a mixture of social, political, and economic motives.²⁸⁴ Most importantly, even if abortion protesters have absolutely no economic motive, their conduct no doubt has *some* economic impact—such as reducing the amount of abortions performed.²⁸⁵ Thus, abortion protesters are not *commercial* actors in the sense that they do not seek to enter into a commercial transaction with the clinics to obtain a service. However, they are *economic* actors in the sense that their actions have both commercial ramifications—since they reduce the volume of business conducted at the clinics—as well as economic ramifications—because patients who have appointments with particular clinics may be turned away and have to expend additional economic resources to travel back the next day.²⁸⁶

Finally, whether abortion protesters have an economic motive (or not) seems to be irrelevant. The Supreme Court has recently indicated that conduct having economic ramifications need not have an economic or profit-seeking motive in order for Congress to

283. Some anti-abortion groups, in fact, do seek to financially injure abortion clinics. For example, in *American Life League, Inc. v. Reno*, 855 F. Supp. 137, 139 (E.D. Va. 1994), *aff'd*, 47 F.3d 642 (4th Cir.), *cert. denied*, 116 S. Ct. 55 (1995), the district court noted that the American Life League, an organization of abortion protesters that challenged the constitutionality of the Access Act, “intend[s] to interfere with abortion providers and to injure them financially.”

284. See Brickey, *supra* note 15, at 809.

285. The dissent in *Wilson* argued that the abortion demonstrators in that case “had no economic end in view: for even if the abortion procedure was free, their goal would remain unchanged.” *Wilson*, 73 F.3d at 693 (Coffey, J., dissenting) (footnote omitted). The demonstrators’ primary motives were not economic, yet that is not to say that they had no economic end in view—they wanted to block a commercial transaction between doctor and patient.

286. The abortion protesters in *Wilson* also forced the Milwaukee fire department to expend time and resources to reopen the clinics. However, one of the arguments that Congress advanced to support the Access Act was that such abortion protests were overwhelming state and local law enforcement agencies. See *supra* text accompanying note 27. Yet it is clear, at least from the record in *Wilson*, that federal intervention was unnecessary to deal with abortion protesting. The dissenting judge in *Wilson* labeled the situation as “federal overkill.” *Wilson*, 73 F.3d at 698 (Coffey, J., dissenting). Coffey argued that not only had Congress exceeded its authority under the Commerce Clause in enacting the Access Act, but that Congress had also “disregard[ed] the ability of state and local officials to deal with the disruption caused by the Milwaukee clinic protesters.” *Id.* Moreover, “[t]his double overkill illustrates the vast distance modern constitutional interpretation has traveled from the Framers’ understanding of the commerce power, and underscores the dangers of an open-ended interpretation of the Commerce Clause.” *Id.* at 698-99.

regulate it. The Court's principle, moreover, came just one term before *Lopez* in *National Organization of Women, Inc. v. Scheidler*.²⁸⁷ *NOW* was a statutory case involving a civil RICO suit brought against a coalition of anti-abortion groups who engaged in extortionate activities similar to those described in the congressional findings for the Access Act.²⁸⁸ RICO requires that an enterprise "be engaged in" or "affect" interstate commerce²⁸⁹ to satisfy the nexus requirement between the enterprise and commerce. The Court held that the term "enterprise," as used in RICO, did not require that a racketeering activity have an economic motive.²⁹⁰

In so ruling, the Court in *NOW* overruled the decisions of three circuits that had held that an enterprise must have an economic motive.²⁹¹ The Court found that the Court of Appeals had "overlook[ed] the fact that predicate acts such as the alleged extortion, may not benefit the protestors financially but still may drain money from the economy by harming businesses such as the clinics . . . in this case."²⁹² Thus, anti-abortion protestors need not have an economic motive because, even if they are only motivated by moral or political reasons, their activities have an economic effect on interstate commerce. Finally, the focus on the motive of the abortion demonstrators overlooks the fact that under the Hobbs Act, the Court has upheld convictions regardless of whether the individual sought to benefit himself economically.²⁹³ Rather, the prevailing view has been that "Congress's power to regulate . . . rests on the effect on interstate commerce, not on the defendant's motive or means of interference with an interstate business."²⁹⁴

287. 510 U.S. 249 (1994) [hereinafter *NOW*].

288. See *id.* at 253.

289. See *id.* at 258.

290. See *id.* The Court observed that "[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives." *Id.*

291. See *National Organization of Women, Inc. v. Scheidler*, 968 F.2d 612, 625-30 (7th Cir. 1992) (abortion protesters do not have requisite economic motive), *rev'd*, 510 U.S. 249 (1994); *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (stating that enterprise must have economic end), *cert. denied*, 488 U.S. 974 (1988); *United States v. Bagaric*, 706 F.2d 42, 55-58 (2d Cir.) (economic gain is necessary but need not be primary motive), *cert. denied*, 464 U.S. 840, and *cert. denied*, 464 U.S. 917 (1983); *United States v. Ivic*, 700 F.2d 51, 59-65 (2d Cir. 1983) (stating that political terrorists do not have requisite motive); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) (enterprise must have economic motive), *cert. denied*, 450 U.S. 912 (1981).

292. *NOW*, 510 U.S. at 260.

293. *United States v. Green*, 350 U.S. 415, 420 (1956).

294. *Merritt*, *supra* note 158, at 726 n.232. *Merritt* shows how anti-abortion activities

The more difficult issue arises out of the apparent conflict between *NOW* and *Lopez*. The Court in *Lopez* noted that the Gun-Free School Zones Act did not regulate “activities that *arise out of* or are *connected with* a commercial transaction.”²⁹⁵ The statute had “nothing to do with ‘commerce’ or any sort of economic enterprise.”²⁹⁶ Plainly, the activities of the anti-abortion groups do not “arise out of” a commercial transaction.²⁹⁷ However, while they do affect an economic enterprise, they are only “connected with” a commercial transaction in that they seek to discourage abortions. They are not commercial actors like the reproductive health services providers and the individuals seeking such services—both of whom are party to a commercial transaction.²⁹⁸

Unfortunately, it is unclear how *Lopez* affects *NOW*. Professor Brickey has noted the tension between *NOW* and *Lopez* and remarked that “[o]ne might be tempted to attribute this semantic puzzle to stylish difficulties among members of the Court were it not for the irony that Justice Rehnquist wrote both the majority opinion in *Lopez* and the unanimous opinion in *NOW*.”²⁹⁹ Perhaps if *Lopez* is construed as embodying the procedural conception of federalism, the two decisions can be reconciled. Indeed, *NOW* may be strong evidence supporting a procedural conception of *Lopez* given that *NOW* came down in 1994, and as the next section shows, most post-*Lopez* courts reviewing the constitutionality of the Access Act have read *Lopez* in precisely this manner. Nevertheless, the post-*Lopez* treatment of the Access Act has not been entirely uniform as one district court decision has recognized the potential implications of *Lopez* for Congress’ commerce power when it struck down the Act as unconstitutional.

targeted by the Access Act are similar to the robbery or extortion activities targeted by the Hobbs Act since “[p]reventing customers from entering the front door of a health clinic has the same economic effect as robbing supplies out the back door—regardless of the defendant’s motive or degree of violence.” *Id.*

295. *Lopez*, 115 S. Ct. at 1631 (emphasis added).

296. *Id.* at 1630-31.

297. See Brickey, *supra* note 15, at 810.

298. See *id.* at 810.

299. *Id.* at 811 n. 62.

4. Post-Lopez Challenges to the Access Act

As already noted, the district court in *Wilson* was overruled by the Seventh Circuit which held that the Access Act is constitutional in light of *Lopez*. In fact, of all the lower courts reviewing the constitutionality of the Access Act after *Lopez*, only one court, the district court in *Hoffman v. Hunt*,³⁰⁰ found it unconstitutional. Still, the conflicting reasoning between these post-*Lopez* courts underscores the uncertainty coming out of *Lopez* over whether it embodies a procedural or substantive conception of federalism.

The district court in *Hoffman* held that while Congress had supported the Access Act with extensive legislative findings, thus making it distinguishable from the Gun-Free School Zones Act, *Lopez* and the case before it were nevertheless "almost identical."³⁰¹ In both *Hoffman* and *Lopez*, for a court to accept the government's arguments it would have to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."³⁰² The district court in *Hoffman* refused to expand Congress' power in this manner because to do so would require it "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated."³⁰³ Thus, the district court properly recognized that the concept of an unlimited enumerated power is inconsistent with our constitutional scheme of limited government.

In reviewing the legislative findings advanced by Congress to support the Access Act, the district court in *Hoffman* agreed with the Seventh Circuit's argument in *Wilson* that Congress is not provided with a basis to regulate abortion protest activities merely because the problem may be national in scope.³⁰⁴ However, unlike the Seventh Circuit, the district court also properly recognized that the regulatory object of the Access Act is abortion protesters, not the abortion clinics themselves.³⁰⁵ This observation led the district court to the appropriate inquiry of whether Congress has

300. 923 F. Supp. 791 (W.D.N.C. 1996).

301. *See id.* at 812.

302. *Id.* at 807 (citing *Lopez*, 115 S. Ct. at 1634).

303. *Id.* (citing *Lopez*, 115 S. Ct. at 1634 (referring to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824))).

304. *See id.*

305. *See Hoffman*, 923 F. Supp. at 807-08.

the authority, in light of *Lopez*, to regulate noncommercial abortion protest activities. Thus, under this analysis, *Lopez* and *Hoffman* were virtually identical for the district court because, like with gun possession near schools, Congress in the Access Act had attempted to regulate an activity that "is not commerce or economic enterprise, however broadly one might define those terms."³⁰⁶ In other words, and very importantly, the district court in *Hoffman* viewed *Lopez* as embodying a substantive conception of federalism when it argued that "[t]he *Lopez* Court made clear that congressional authority over those activities that substantially affect interstate commerce . . . is limited to those activities that can fairly be characterized as commercial or economic."³⁰⁷ Under this view, certain activities would be immune from federal regulation, notwithstanding their effect on interstate commerce, because to decide otherwise would be to permit Congress to "regulate such subjects as family law, day-care, education, and any other facet of our daily lives . . . by simply finding that those activities substantially affect interstate commerce; for those activities surely do affect interstate commerce more than [abortion protest activities do]."³⁰⁸

The district court in *Hoffman* also found the Access Act deficient in both a procedural and quasi-procedural respect in finding that: (1) the Access Act lacks a jurisdictional element;³⁰⁹ and (2) the legislative findings for the Access Act failed to establish a substantial effect on interstate commerce from abortion protest activities.³¹⁰ However, the Court's agreement with the substantive

306. *Id.* at 813 (citing *Lopez*, 115 S. Ct. at 1631).

307. *Id.* at 813-14. Thus, the district court argued that the Eleventh Circuit's decision in *Cheffner v. Reno*, 55 F.3d 1517 (11th Cir. 1995), and the Seventh Circuit's decision in *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), both upholding the Access Act on Commerce Clause grounds, were wrongly decided because they "ignore the Supreme Court's instruction [from *Lopez*] that Congress' authority to regulate activities that substantially affect interstate commerce is limited to the regulation of commercial or economic activities that substantially affect interstate commerce." *Hoffman*, 923 F. Supp. at 814 (citing *Lopez*, 115 S. Ct. at 1630-31).

308. *Hoffman*, 923 F. Supp. at 814. The district court argued that such an expansive conception of the commerce power would give the federal government "a plenary power" to enact any type of legislation, and that this would thus "eviscerate the limited government secured by the enumeration of federal powers contained in the Constitution." *Id.* (citing *Lopez*, 115 S. Ct. at 1633).

309. *See id.* at 817 (citing *Lopez*, 115 S. Ct. at 1631).

310. *See id.* at 814. The district court claimed that "[a]t best, the congressional findings serve to establish a trivial or merely incidental impact that these protest activities have on interstate commerce." *Id.* at 816.

conception of *Lopez* is the most significant, and potentially far-reaching, aspect of its decision.³¹¹

Unfortunately, *Hoffman* is alone in its post-*Lopez* treatment of the Access Act as every other lower court addressing the constitutionality of the statute has upheld it under the Commerce Clause. The court in *United States v. White*³¹² did not consider *Lopez* to be a major obstacle to the constitutionality of the Access Act at all. The defendants in *White* had argued that *Lopez* supports their contention that Congress' findings for the Access Act are not rational because such findings would allow Congress to regulate any activity.³¹³ The district court in *White*, however, did not see any direct connection between the two cases. It argued that federal courts must defer to Congress if they find "any rational basis" for a finding that an activity substantially affects interstate commerce.³¹⁴ In so holding, the *White* court felt compelled to respond to the district court in *Wilson* by arguing that "[w]ith all due respect, it does appear that the court [in *Wilson*] substituted its own findings for those of Congress"³¹⁵ and that it had "converted the rational basis test into one involving the strictest scrutiny."³¹⁶

In upholding the Access Act, the district court in *White* first distinguished *Lopez* by noting that the effect of clinic violence on interstate commerce, unlike the effect of guns near schools, was well-documented.³¹⁷ This holding embodies the procedural conception of *Lopez* because *White* reads *Lopez* as an example of Congress failing to meet the procedural requirement of findings in a case where the connection to interstate commerce is not immediately evident to the court.³¹⁸ The district court also argued that, unlike gun possession near schools, the campaign against abortion clinics is national in scope³¹⁹ and that abortion violence has clear

311. The district court did note, however, that its decision is not alarming as Congress would still have vast regulatory authority even under its conception of *Lopez*. See *Hoffman*, 923 F.Supp. at 819.

312. 893 F. Supp. 1423 (C.D. Cal. 1995).

313. See *id.* at 1432. Such an argument is not groundless after *Lopez*. The district court in *Wilson* argued that the rationales advanced by Congress to support the Access Act would allow Congress to regulate "any sphere of human activity." See *Wilson*, 880 F. Supp. at 631. Similarly, the Court in *Lopez* was concerned with rationales of Congress that would give it unlimited power to regulate. See *Lopez*, 115 S. Ct. at 1632.

314. See *White*, 893 F. Supp. at 1432.

315. *Id.*

316. *Id.*

317. See *id.* at 1433.

318. See *Lopez*, 115 S. Ct. at 1631.

319. This could be another distinguishing factor from *Lopez*. Congress passed the Access

"commercial ramifications involving patients, providers, and clinic staff members."³²⁰ Ultimately, and most importantly, however, the district court in *White* never even drew the distinction between commercial and noncommercial activities in upholding the Access Act. Therefore the *White* court adhered to a procedural conception of *Lopez*.

Another district court, in *United States v. Lucero*,³²¹ addressed the constitutionality of the Access Act under the Commerce Clause. As in *White*, the court in *Lucero* distinguished *Lopez* by arguing that, unlike the Gun-Free School Zones Act, the Access Act regulates activities that substantially affect interstate commerce due to the interstate movement of medical supplies and the interstate travel of employees and patients.³²² The Court argued that unlike the Gun-Free Schools Act, the Access Act "regulates conduct which, by its very design, threatens a particular type of commerce—the provision of reproductive health services."³²³ Of course, this is exactly the argument that the district court in *Wilson* raised to invalidate the Access Act. The *Wilson* district court, however, had argued that the Access Act does not seek to regulate the reproductive health clinics, which the district court conceded Congress could regulate, but instead the private conduct affecting those facilities.³²⁴ The *Lucero* court directly responded to this by arguing that *Wilson* erred when it "focused on the non-commercial na-

Act in part based on the argument that abortion clinic violence was beyond the control of state and local authorities. See *White*, 893 F. Supp. at 1433. By contrast, the problem of guns in school zones was already adequately dealt with by the State of Texas. See Act of Apr. 12, 1871, 12th Leg. R.S., 1871 Tex. Gen. Laws (current version codified at TEX. PENAL CODE ANN. § 46.19(a)(1) (West 1995)) (prohibiting firearm possession on, or within 300 feet of, the premises of a school); TEX. PENAL CODE ANN. § 46.03(f) (West 1995) (providing that such offenses are third-degree penalties). There was no mention in both the Fifth Circuit and the Supreme Court opinions about the inability of local authorities to deal with the problem.

On the other hand, even the Seventh Circuit in *Wilson* conceded that merely finding that a problem is national in scope does not give Congress carte blanche authority to regulate it. *Wilson*, 73 F.3d at 683. Moreover, other evidence suggests that anti-abortion protesting is adequately dealt with at the state and local level. *Id.* at 699 (Coffey, J., dissenting) (citing cases in which state statutes have been used to convict anti-abortion protestors).

320. *White*, 893 F. Supp. at 1433.

321. 895 F. Supp. 1421 (D. Kan. 1995).

322. See *id.* at 1423.

323. *Id.* at 1424.

324. See *Wilson*, 880 F. Supp. at 628.

ture and purpose of the regulated activity itself rather than the effect of that conduct on interstate commerce."³²⁵

The *Lucero* court's emphasis on the effect of an activity on interstate commerce, rather than the nature of that activity, is grounded on the procedural conception of federalism in *Lopez*. It draws support from the fact that the *Lopez* Court upheld its New Deal jurisprudence. In fact, the *Lopez* Court quoted from cases like *Wickard*, where the Court stated that even if Filburn's "activity [is] local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."³²⁶ Unfortunately, by grounding the Commerce Clause analysis on the effect of an activity on interstate commerce, rather than on the nature of that activity, the court fell into the trap of the unlimited enumerated power. If Congress is simply left to determine whether an activity has a substantial effect on interstate commerce, then there is no real limit on Congress because every human activity affects interstate commerce as every human activity can have economic effects.³²⁷ Thus, every human activity would potentially be subject to the commerce power.³²⁸ This Note, by contrast, shifts the Commerce

325. *Lucero*, 895 F. Supp. at 1424 n.2 (emphasis added).

326. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (emphasis added) (quoted in *Lopez*, 115 S. Ct. at 1628). Thus, the Court in *Lopez* implied that the economic effect of an activity, rather than its nature, is the important Commerce Clause inquiry. Cf. Judge Louis H. Pollak, *Reflections on United States v. Lopez: Foreward*, 94 MICH. L. REV. 533, 547 (1995) (arguing that "the relevant inquiry would not be whether gun possession is 'economic' but whether it has substantial economic consequences").

327. Professor Calabresi points out how this "is not a profound observation or a novel insight." Calabresi, *supra* note 217, at 802. "[I]f you follow the chain of causation far enough everything seems to affect everything else." *Id.* (citing *Wickard*, 317 U.S. at 123-25, 128-29). In fact, economics has been defined as the study of "rational choice in a world [where] resources are limited in relation to human wants." See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (3rd ed. 1992) (citing GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976)). Thus, education can be seen as economic since "it involves investment of time and resources in the accumulation of knowledge and skills for future use in work and other activities." McJohn, *supra* note 146, at 27 (citing GARY S. BECKER, *HUMAN CAPITAL* (2d ed. 1975)). Even the activity of a homemaker can be considered economic activity because it involves cost—such as the homemaker's time. Therefore, if Congress can regulate any economic activity, it can regulate homemaking since the services provided by homemakers clearly have a substantial effect on the national economy.

328. If all human activity is subject to Congress' commerce power, then there is virtually no role for the judicial department aside from ensuring that Congress satisfies procedural requirements, such as legislative findings, jurisdictional elements, or clear statements, before exercising its commerce power.

Clause inquiry to the *nature* of the activity in question, rather than the effect of that activity on interstate commerce. The next section relies on this approach as a way to secure meaningful limits to the commerce power.

III. A PROPOSAL AND APPEAL FOR SUBSTANTIVE LIMITS ON THE COMMERCE CLAUSE

A. *The Commercial Activities Test*

The commercial activities test is a workable proposal grounded on the substantive conception of *Lopez*. It focuses not on the *effect* that an activity has on interstate commerce but rather on the *nature* of the activity itself as a means of articulating substantive, categorical limits to the commerce power. The linchpin of the proposal involves developing a distinction between commercial activities and noncommercial activities and then applying that distinction to the activity in question.³²⁹ Under the commercial activities test, if the "activity is commercial, the 'substantial effects' jurisprudence applies, allowing Congress to regulate the activity if, in the aggregate, it substantially affects interstate commerce; otherwise, the doctrine is inapplicable and affords Congress no basis for regulation."³³⁰

Unfortunately, for all the commentary generated over the meaning of *Lopez*, there has been a dearth of commentary on how to begin distinguishing between commercial and noncommercial activi-

329. If there is one criticism of this Note's proposal, it is that it appears to draw an artificial distinction between commercial and noncommercial activities. See, e.g., Nagel, *supra* note 15, at 649 (labeling as "superficial" the distinction between commercial and noncommercial activities because even the latter have substantial effects on interstate commerce). However, when it comes to constitutional limitations, principle must not be sacrificed to practicality. There may be room to quibble over the Framers' constitutional design. However, the remedy is to amend the Constitution through the amendment process.

330. *United States v. Bishop*, 66 F.3d 569, 591 (1995) (Becker, J., concurring in part and dissenting in part), *cert. denied*, 116 S. Ct. 681 (1995), and *cert. denied* 116 S. Ct. 750 (1996). Ironically, the dissent in *Bishop*, after arguing that the commerce power only reaches commercial activities after *Lopez*, proceeded to carve out a huge exception that swallows up the rule. The dissent argued that "non-commercial enactments . . . should be upheld only to the extent that adequate data, available either by way of congressional findings or otherwise, establish that the proscribed non-commercial activity has a sufficient relationship to interstate commercial activity." *Id.* at 592. However, Congress's power under the Commerce Clause should strictly be limited to commercial activity only, regardless of how substantial its effect is on interstate commerce. Under the Constitution, certain activities are properly left "to the individual States, notwithstanding these activities' effects on interstate commerce." *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring).

ties. This is not surprising, given the conflicting signals as to whether the Court was even articulating a substantive conception of federalism and especially given the Court's loose use of language. For example, the Court in *Lopez* seemed to conflate the terms "economic" and "commercial."³³¹ The Court cited *Wickard* as an example of congressional regulation being upheld "[w]here *economic* activity substantially affects interstate commerce."³³² However, if the Court were truly grounding Congress' power under the Commerce Clause on the basis that it can regulate *economic* activities, then the commerce power has no limits because all human activity has economic effects.³³³ It would have been more appropriate for the Court to label Roscoe Filburn's activity in *Wickard* as *commercial* since Filburn was a commercial farmer.³³⁴

Thus, this Note's proposal attempts to clarify the difference between economic activities and commercial activities. It posits that all human activities are *economic* since all activities have some economic or commercial effect on interstate commerce. As Justice Kennedy argued in *Lopez*, "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence."³³⁵ However, while all activities may be economic activities, not all activities are *commercial* activities. This is because, as defined below, not all activities are directly associated with a commercial transaction or a "voluntary economic exchange."³³⁶ The procedural conception of *Lopez* fails to appreciate this commercial/economic distinction and thus permits Congress to regulate virtually every human activity—a fundamental inconsistency with a system of enumerated powers.

331. Cf. McJohn, *supra* note 146, at 26 (noting that "[t]he Court made no attempt to define what it meant by 'economic' and 'commercial,' as though the terms needed no further definition").

332. *Lopez*, 115 S. Ct. at 1630 (emphasis added).

333. See *supra* note 327 and accompanying text.

334. See Merritt, *supra* note 158, at 710 n.145. Indeed, Roscoe Filburn sold some of his wheat. See *Wickard v. Filburn*, 317 U.S. 111, 114 (1942). Thus, Roscoe Filburn could properly be classified as a commercial actor based on his practices and the anticipation that he would likely sell more wheat in the future. On the other hand, merely because an individual was once involved in a commercial transaction at one time does not mean that the individual could still be classified a commercial actor once the transaction has been completed. Otherwise, every individual who, at one time, was involved in a commercial transaction would be a commercial actor. The proper distinction must be drawn. See *infra* Part III Section B.

335. *Lopez*, 115 S. Ct. at 1640 (Kennedy, J., concurring).

336. *United States v. Bishop*, 66 F.3d 569, 602 (1995) (Becker, J., concurring in part and dissenting in part) (emphasis omitted).

The need to articulate limits to the commerce power, of course, should not lead the Court to adopt a limit for its own sake. Rather, any limit must draw support from the text of the Constitution itself—its general structure and the principles underlying it, as well as the early judicial interpretations of the Commerce Clause. In other words, true limits must be found in the Constitution, not in a justice's own conception of the commerce power. As a logical starting point, then, it is crucial to examine the text of the Constitution itself, or more specifically, the term "interstate commerce." When Chief Justice Marshall first construed the term in *Gibbons*, he focused on its "interstate" prong in order to hold that the commerce power does not extend to intrastate commerce.³³⁷ Today, one might validly argue that the concept of "intrastate" commerce has lost all meaning in a modern, highly integrated economy.³³⁸ Nevertheless, the word "commerce" still imparts meaning and provides a limit to the concept of "interstate commerce." The commercial activities proposal, in this regard, has its foundation in the Constitution. It is no small coincidence, in fact, that the term "commercial" bears such a close resemblance to the term "commerce" since "commercial," literally, means "[o]f or pertaining to commerce [or] engaged in commerce."³³⁹ In addition, "commercial" means "having profit as a chief aim."³⁴⁰ Thus, it is possible to arrive at a properly limited definition of "commercial activity" by reconstructing the meaning of "commerce" in "interstate commerce."³⁴¹

To this end, the Framers' understanding of the term "commerce" provides guidance. At the time the Constitution was ratified, for example, "commerce" was understood to include such activities as buying and selling, bartering, trading, transporting, and traffic.³⁴² An early judicial definition of "commerce," provided by Chief Justice Marshall in *Gibbons*, then grounded the term in a conceptual framework. Marshall argued that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It de-

337. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

338. See *supra* note 259.

339. AMERICAN HERITAGE DICTIONARY 297 (2d ed. 1987). Black's Law Dictionary defines "commercial" as: "[r]elates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce." BLACK'S LAW DICTIONARY 270 (6th ed. 1990).

340. BLACK'S LAW DICTIONARY 270 (6th ed. 1990).

341. U.S. CONST. art. I, § 8, cl. 3.

342. See *Lopez*, 115, S. Ct. at 1643 (Thomas, J., concurring).

scribes the *commercial intercourse* between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."³⁴³ This definition presupposes some sort of interchange between two entities.³⁴⁴ Implicit in this concept is the notion that the activity is somehow voluntary. Indeed, this "voluntary" feature finds support in the fact that the Framers never intended for the Commerce Clause to function as a national police power to federalize every local crime.³⁴⁵ Thus, it is necessary to delineate between activities of a criminal nature, which are coercive, and those of a commercial nature, which are voluntary.

Based on this conceptual framework, the *sine qua non* of "commercial activity" must be some sort of *voluntary commercial transaction or economic exchange between two entities, having profit as its chief aim*.³⁴⁶ Concededly, this definition of "commercial activity" is still abstract and therefore must be placed in concrete form through application. Thus, the next section explores the contours of the commercial activities standard and reveals its implications for federal law by applying it to several hypotheticals as well as to several federal statutes. First, however, the next section articulates a concept known as the "lens of federalism." This concept serves as a useful device for properly applying the commercial activities standard in the face of the modern trend toward federalization.

343. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) (emphasis added).

344. In fact, an alternative definition of "commerce" is "sexual intercourse." AMERICAN HERITAGE DICTIONARY 297 (2d ed. 1987).

345. Cf. *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring).

346. Viewed from this standpoint, it is possible to reconcile the Court's recent decisions in *Terminix* and *Robertson* with *Lopez* since both of those cases clearly involved commercial activities. *Terminix* involved a commercial transaction—a termite extermination contract between an exterminator and a homeowner. See *Allied-Bruce Terminix Companies v. Dobson*, 115 S. Ct. 834, 837 (1995). *Robertson* involved a business actually engaged in commerce. See *United States v. Robertson*, 115 S. Ct. 1732, 1732-33 (1995). Moreover, *Robertson* can be classified as falling within the second category of the Court's tripartite framework for defining Congress' commerce power. See *supra* notes 131-35 and accompanying text. The gold mine in *Robertson* was engaged in interstate commerce. See *Robertson*, 115 S. Ct. at 1733. By contrast, the Court argued that "[t]he 'affecting commerce' test was developed . . . to define the extent of Congress's power over purely *intrastate commercial* activities that nonetheless have substantial *interstate* effects." *Id.* (emphasis added). The Court's rhetoric, once again, implies that a distinction between commercial and noncommercial activities is necessary.

B. Application of the Commercial Activities Standard

There is a real dilemma with how to define "commercial" so that it is neither so narrow that it returns us to a "horse-and-buggy definition of interstate commerce,"³⁴⁷ nor so broad that it leads us to the paradox of the unlimited enumerated power. Obviously, a court may face uncertainty as to the precise nature of an activity the closer it gets to the boundary between commercial and non-commercial activities. Yet it is at this point that a court must analyze the nature of an activity under the "lens of federalism."³⁴⁸ Employing this concept, courts must analyze the nature of an activity based on the premise that there are "real limits" on the commerce power and that the Constitution does not extend to Congress a national police power.³⁴⁹ This will ensure that the commercial activities test will not be compromised by labelling everything "commercial."

For example, the Third Circuit, in *United States v. Bishop*,³⁵⁰ upheld the federal carjacking statute³⁵¹ on the basis "that carjacking, a violent criminal activity, is a commercial transaction."³⁵² Yet, as the dissent correctly pointed out, the majority ran "afoul of the *Lopez* Court's admonition that any definition of 'commercial' must be one that provides 'real limits' on the scope of Commerce Clause authority."³⁵³ Indeed, Chief Justice Rehnquist in *Lopez* cautioned that "depending on the level of generality, any activity can be looked upon as commercial."³⁵⁴ While Rehnquist may have conflated the terms "economic" and "commer-

347. Franklin D. Roosevelt, *Press Conference in Response to Supreme Court Decisions Overturning New Deal Legislation*, 31 May 1935, in 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 200, 221 (Samuel I. Rosenman ed., 1938).

348. "Federalism is the lens through which the commerce power must be viewed." *Wilson*, 73 F.3d at 698 (Coffey, J., dissenting).

349. See *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring).

350. 66 F.3d 569 (1995).

351. 18 U.S.C. § 2119 (1994).

352. *Bishop*, 66 F.3d at 591 (Becker, J., concurring in part and dissenting in part).

353. *Id.* at 592 (citing *Lopez*, 115 S. Ct. at 1633). The dissent added that "[t]he majority's arguments prove far too much" because under the majority's definition of "commercial transaction," Congress could perhaps criminalize "nearly all criminal activity occurring within a state." *Id.*

354. *Lopez*, 115 S. Ct. at 1633. Ironically, the Court's opinion contradicted itself by arguing that the Gun-Free School Zones Act had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms," since "of course one might define those terms broadly enough to include gun possession." McJohn, *supra* note 146, at 26-27 (citing *Lopez*, 115 S. Ct. at 1630-31).

cial," the relevant point is that the commercial activities test must not be construed so that Congress can regulate virtually every activity. Otherwise, the "lens of federalism" concept would be undermined. At the other extreme, however, the standard must not be construed so that it effectively guts the commerce power either. The lens of federalism must also allow for a viable commerce power in a modern economy.

Proceeding with this understanding, then, it is apparent that the commercial activities standard cannot be limited to the actual commercial transaction itself since this would construe the Commerce Clause far too narrowly. Congress must also have the power to regulate those activities leading up to the commercial transaction, essentially those activities carried on with an anticipation of the commercial transaction. Based on this definition of "commercial activities," Congress would have the authority to regulate most aspects of interstate businesses, including the minimum wage of employees, working conditions, safety standards, and hiring policies, since the culmination of all of these activities is a product or service offered to consumers. Business enterprises are safely within the commercial activities sphere. Thus the minimum wage regulations of such enterprises are not as problematic as the minimum wage and overtime regulation of state employees at issue in *National League*.³⁵⁵ However, the commercial activities test would not necessarily restore the result in *National League* since the employment agreement between a state employee and the state is a voluntary economic exchange entered into for profit—a commercial activity.

This is not to say that Congress can regulate every aspect of state public schools, police and fire departments, and other similar state institutions. On the contrary, Congress cannot.³⁵⁶ Entities like public schools, for example, are not parties to a commercial transaction unlike private schools are that receive funding from private individuals through contractual arrangements rather than from property taxes. Although Congress would have regulatory authority over commercial transactions entered into by public schools, such

355. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

356. Of course, a substantive conception of the Tenth Amendment, like that in *National League*, could further limit the power of the federal government. However, the Tenth Amendment may have more value not as a sword to strike down legislation within Congress' sphere of authority, but as a shield to ensure that Congress' commerce power is not interpreted to encompass virtually all activities of the states. See *supra* note 112.

as when public schools purchase school supplies, it would not have power to set curriculum standards, hiring policies, and so forth, since these activities are not conducted in anticipation of a commercial transaction.³⁵⁷ Thus, where *Lopez* expresses concern that Congress might use the commerce power to regulate areas like education, "where States historically have been sovereign,"³⁵⁸ the commercial activities test would, for the most part, preclude such interference. Indeed, one of the benefits of this Note's commercial activities proposal is that it dovetails with the concern for protecting traditional state prerogatives. Under the proposal, congressional regulation of the family, education, and local crime would be severely restricted. Yet these are precisely the areas that *Lopez* identified as peculiarly within the province of the states.³⁵⁹

As applied to the Court's standing jurisprudence, this commercial activity framework might still be consistent with cases like *Wickard* because, while Roscoe C. Filburn grew wheat for home consumption, his excess wheat was likely sold in interstate commerce.³⁶⁰ Thus, the Agriculture Adjustment Act could be constitutionally applied to Roscoe Filburn. On the other hand, if Roscoe Filburn grew wheat *purely* for home consumption, Congress would not have a basis to regulate that activity under the commercial activity test. Congress, for example, could not regulate backyard gardens because, while such gardens are economic activities since they affect the interstate market by reducing demand,³⁶¹ they

357. While public schools, for example, might be engaged in the stream of commerce, an argument supporting Congress's power to regulate public schools based on that rationale proves too much. As the district court in *Wilson* observed, all persons and entities operate within the stream of commerce. *United States v. Wilson*, 880 F. Supp. 621, 630 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995). It is not enough that schools are economic enterprises. They must also be commercial activities.

358. *Lopez*, 115 S. Ct. at 1632.

359. *Id.* ("Areas such as criminal law enforcement or education [are areas] where States historically have been sovereign."); *see id.* at 1632-33 (expressing the concern that Congress might be able to regulate aspects of family law, including marriage, divorce, and child custody, based on the rationale that such activities affect national productivity); *id.* at 1640 (Kennedy, J., concurring) ("[I]t is well-established that education is a traditional concern of the States.").

360. Roscoe Filburn's practice was "to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding." *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

361. *Cf. id.* at 128 (explaining how home-grown wheat influences price and market conditions). Gardening is economic activity because it has economic effects. But it is not commercial activity because individuals do not seek to sell their vegetables.

would not be commercial activities. Similarly, Congress would not have a basis to regulate a homemaker's duties because, while the activity when taken in the aggregate with other similarly situated homemakers clearly has a substantial effect on interstate commerce, it is only economic activity, not commercial activity. The activities are not performed in anticipation of a commercial transaction, like the planting of seeds in Filburn's field. Thus, under the substantive conception of *Lopez*, a highly important limitation is placed on Congress' commerce power. No longer may Congress use the aggregation principle to widen the regulatory sphere over any activity in order to satisfy the substantial effects test.³⁶² The ambit of Congress' regulatory authority would be limited strictly to commercial activities.

Along the same lines, Congress would not have a basis to regulate other private activities of Roscoe Filburn, such as his personal lifestyle. Although his lifestyle may affect the quality or quantity of goods he produces for the interstate market, the commerce power cannot reach so far back that any activity which influences the quality of a commercial transaction may be subject to regulation. Congress cannot be afforded the power to regulate activities prior to commercial "intercourse." Simultaneously, at the other extreme Congress' power cannot extend to activities subsequent to the *completion* of the commercial transaction.³⁶³ Once the commercial transaction ends, the nature of commercial activity also ends. Thus, Congress cannot criminalize the mere possession of drugs following a purchase. The commercial transaction in that case has ended. However, Congress can regulate the actual sale of drugs as well as the possession with intent to sell, since the latter activity leads to the commercial intercourse. Hence, the Drugs-Free School Zones Act, which prohibits "distributing, possessing with intent to distribute, or manufacturing a controlled substance" in a

362. See *supra* notes 205-18 and accompanying text.

363. The pure exchange of money does not necessarily complete the commercial transaction, at least not when it deals with providing services as opposed to goods. Thus, one individual may pay another individual money up front in exchange for services over a period of time. The commercial intercourse would continue until the services are completed. On the other hand, an individual who is performing a service with the anticipation of getting paid would be a commercial actor. Interestingly, Alfonso Lopez may have fallen in this latter category because he apparently received the gun from an individual named Gilbert who said he would pay Lopez forty dollars for delivering the gun to another individual named Jason. See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995).

school zone³⁶⁴ would be constitutional since these activities are conducted in anticipation of commercial intercourse. By contrast, the Gun-Free School Zones Act, which criminalizes mere possession of guns,³⁶⁵ would be unconstitutional because while the antecedent purchase of the firearm involves a commercial transaction, that transaction ceases at the point of sale. The subsequent possession of the gun in a school zone could not properly be defined as commercial activity.³⁶⁶

The commercial activity test would have a serious impact on other federal criminal statutes as well. Criminal statutes like the Hobbs Act³⁶⁷ and the Anti-Car Theft Act,³⁶⁸ for example, would be unconstitutional because Congress would be regulating activities that do not involve a voluntary commercial transaction or exchange. The fact that individuals employ such means as extortion or carjacking to personally profit would not change the inherently coercive, involuntary nature of such activities. They are noncommercial activities and are properly left exclusively to the jurisdiction of the states—not to a national police power.³⁶⁹

However, unlike extortion or robbery, Congress would still have authority to regulate securities fraud under § 10(b) of the Securities Exchange Act of 1934³⁷⁰ and Rule 10b-5 promulgated by the Securities and Exchange Commission.³⁷¹ While fraud involves “[a]n intentional perversion of truth” or “concealment . . . intended to deceive another,”³⁷² the underlying transaction is still entered into voluntarily. Fraud differs in nature from coercion, which is defined as the use of actual or threatened force, violence, or fear—“where one party is constrained by subjugation to [an]other to do what his free will would refuse.”³⁷³ Unlike fraud, coercion compels compliance involuntarily.

364. See 21 U.S.C. § 860 (1994). The Drug-Free School Zones Act was upheld following *Lopez*. See *United States v. Garcia-Salazar*, 891 F. Supp. 568 (D. Kan. 1995).

365. See 18 U.S.C. § 922 (q)(2)(a) (1994).

366. The district court in *Garcia-Salazar* noted this distinction and argued that “[d]rug trafficking is inherently commercial in nature; firearm possession is not.” *Garcia-Salazar*, 891 F. Supp. at 572.

367. 18 U.S.C. § 1951(a) (1994).

368. 18 U.S.C. § 2119 (1994).

369. See *Lopez*, 115 S. Ct. at 1650 (Thomas, J., concurring) (the Constitution “does not cede a police power to the Federal Government”).

370. 15 U.S.C. § 78j(b) (1994).

371. 17 C.F.R. § 240.10b-5 (1994).

372. BLACK’S LAW DICTIONARY 660 (6th ed. 1990).

373. BLACK’S LAW DICTIONARY 258 (6th ed. 1990).

The issue of loansharking in *Perez* thus presents a unique problem for the commercial activities proposal. On one hand, such transactions are entered into voluntarily. On the other hand, employing threats or the use of violence as a means of collection³⁷⁴ is inherently coercive. Courts facing this quandary would have several options. They might treat the actual extension of credit (the voluntary transaction) as distinct from the collection of credit (the transaction employing coercion) and allow Congress to regulate the former but not the latter. However, courts may be more inclined to treat the entire process as a single transaction, thus unifying both its voluntary and involuntary aspects.³⁷⁵ This problem exemplifies the legal uncertainty, noted by the dissent in *Lopez*,³⁷⁶ that arises from the distinction between commercial and noncommercial activities. It is unclear how courts should resolve this uncertainty, but they must weigh several factors, including the built-in presumption of the commercial activities test that courts view the commerce power through the lens of federalism.³⁷⁷

Undoubtedly, the distinction between commercial activities and noncommercial activities will entail some degree of legal uncertainty, yet the sanctuary of certainty is intolerable if it leaves an enumerated power unlimited. As Justice Thomas argued, "one advantage of the [*Lopez*] dissent's standard is certainty: it is certain that under its analysis everything may be regulated under the guise of the Commerce Clause."³⁷⁸ Such certainty, however, is incompatible with the constitutional system of enumerated powers. Moreover, even despite the existence of some legal uncertainty, its quantum will be relatively minimal. For the most part, the application of the commercial activities test, as confirmed by this Note, is fairly straight-forward. As applied to the constitutionality of the Access Act, the answer is unequivocal.

374. See *Perez v. United States*, 402 U.S. 146, 147 (1971) (noting that loan sharks use or threaten the use of violence in enforcement).

375. This seems to be the more logical approach since the entire process, from the extension of credit to the collection of credit, can be seen as the same intercourse which extends over a long period of time.

376. See *Lopez*, 115 S. Ct. at 1664-65 (Breyer, J., dissenting). The dissent in *Lopez* criticized the majority for its holding because "it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled." *Id.* at 1664.

377. See *supra* notes 348-49 and accompanying text. This is where Professor Merritt's fuzzy logic approach to "interstate commerce" may aid courts. Merritt argues that judges "must decide what degree of 'commerce-likeness' will satisfy the constitutional definition of interstate commerce." Merritt, *supra* note 158, at 744 (footnote omitted).

378. *Lopez*, 115 S. Ct. at 1650 (Thomas, J., concurring).

C. Closing the Commerce Clause Door to the Access Act

The Access Act, as an exercise of the commerce power,³⁷⁹ is clearly a congressional overreaching of power under the commercial activities test. The abortion protesters targeted by the Access Act are not part of the commercial intercourse between the clinics and the patients. In fact, abortion protesters cannot even be placed on either extreme of the commercial activity continuum, whether it be the pre-commercial activities extreme, as Roscoe Filburn's personal lifestyle would be, or the opposite extreme where the transaction has ended—as with the mere possession of guns near schools following a purchase. Instead, the anti-abortion protesters are perpendicular to the commercial activity continuum. They seek no part of the clinics' commercial intercourse. Instead, they intend to disrupt it. Abortion protesters also fail the other prong of the commercial activity test because they do not have profit as their chief aim. Even though they may seek to financially injure the clinics, their chief aim is to prevent abortions, not to profit monetarily. Therefore, abortion protesters are only economic actors, not commercial actors. They engage in civil disobedience, the control of which should be properly left to the exclusive jurisdiction of the states' criminal laws under their police powers, not to a federal Access Act under the *commerce* power.

CONCLUSION

Although the Framers developed a system with overlapping spheres of authority between federal and state government, they also envisioned a system where the respective governments would act independently of one another. The modern formulation of the Commerce Clause, however, has skewed this constitutional balance and has emasculated the system of enumerated powers under the Constitution. The Janus-faced approach of the Court's jurisprudence since the New Deal has done violence to the constitutional scheme when it, in theory, pledged allegiance to constitutionally mandated limits under the Commerce Clause, but in practice, displayed the contradiction of the unlimited enumerated power. Unfortunately, as long as Congress can regulate all human activities which exert an

379. An alternative source of authority to enact the Access Act may be found under Section 5 of the Fourteenth Amendment. For an analysis that this provision also cannot support the Access Act, see *United States v. Wilson*, 880 F. Supp. 621, 634-36 (E.D. Wis.), *rev'd*, 73 F. 3d 675 (7th Cir. 1995).

economic effect on interstate commerce, its power will remain unlimited.

This Note proposes that substantive constraints, rather than procedural limitations, must guide the Court in fashioning a limit to the Commerce Clause following *Lopez*. It proposes that the commerce power must be limited to *commercial* activities, rather than merely *economic* activities, as supported by the structure of the Constitution itself and reflected in the term "interstate *commerce*." Under the commercial activities test, certain spheres of activity would be outside the scope of the commerce power, notwithstanding their effect on interstate commerce. Under this test, the Access Act is exposed as another intrusion on state prerogatives.

While some critics will be hostile to the resurrection of substantive, categorical limits to the commerce power, this Note's proposal represents an appeal to the Court to place principle above practicality. It represents an appeal to preserve the role of the states in the Framers' constitutional design. Naysayers will decry such a proposal as dangerous formalism or criticize the Court as being proactive for unsettling sixty years of stable Commerce Clause jurisprudence by adopting a commercial activities requirement. In reality, however, the Court would actually be operating reactively because it would be protecting fundamental constitutional principles. In the end, it means no less than preserving the integrity of the system of enumerated powers—the fountainhead of our constitutional structure.

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